

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-06-90-T

BEFORE TRIAL CHAMBER I

**Before: Judge Alphons Orie, Presiding
Judge Uldis Ķinis
Judge Elisabeth Gwaunza**

Registrar: Mr. John Hocking

Date: 27 July 2010

THE PROSECUTOR

v.

ANTE GOTOVINA, IVAN CERMAK AND MLADEN MARKAC

PUBLIC REDACTED VERSION

GOTOVINA DEFENCE FINAL TRIAL BRIEF

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I. Introduction

1. Pursuant to the Trial Chamber's Scheduling Orders,¹ the Defence files its Final Trial Brief on behalf of General Ante GOTOVINA.

II. Summary of argument

JUDGE ORIE: First of all, Mr. Galbraith, did you consider the purpose of Operation Storm primarily to expel the Serbs?

GALBRAITH: No, not at all.

JUDGE ORIE: Did you consider that this was or could be a side effect of militarily taking over the Krajina territory and have it within Croatia again?

GALBRAITH: I did not consider that the expulsion of the Serbs would be a side effect, but I did consider that the departure of the Serbs would be a side effect.²

2. In this quote, Prosecution witness GALBRAITH refuted the core of the Prosecution case. He concluded that expulsion of Serbs was not the purpose of Operation Storm, but that their departure would be an unavoidable side-effect. The Prosecution has never made this fundamental distinction.
3. The evidence in this case is straightforward. After more than four years of Serbian aggression, ethnic cleansing and occupation, combined with the failure of the United Nations ("UN") to peacefully reintegrate its occupied territories, Croatia seized a strategic opportunity to prevent its permanent territorial dismemberment by launching a professionally-planned military operation to re-take the so-called "Krajina" while fully respecting the laws of war. There was no unlawful shelling, no terror campaign, and no mass-expulsion of civilians. The departure of Serb civilians occurred not because of any attack directed at civilians by the HV,³ but because of evacuation orders issued in the afternoon of 4 August by so-called Republika Srpska Krajina ("RSK") officials who feared that the ARSK⁴ and the Serb population would become encircled by HV forces, and decided pursuant to the interests of the

¹ 16 June 2010; 7 July 2010.

² Galbraith, T:5055;21-50556:4.

³ Croatian Army.

⁴ Army of the so-called Republika Srpska Krajina.

Serbian JCE⁵ that it was better to move the entire population out of Croatia rather than to live in a Croatian State.

4. There is overwhelming evidence that the Croatian State established a policy before, during and after Operation Storm to protect civilians and their property, to restore law and order, and to repress crimes amidst the lawlessness prevailing after the RSK's sudden collapse. GOTOVINA in particular made great efforts to train professional and disciplined soldiers in the newly created HV army despite desperate war-time circumstances, and took all necessary and reasonable measures to prevent and punish crimes by his subordinates. The Prosecution has manifestly failed to prove that GOTOVINA participated in a JCE to expel Serbs from liberated Croatian territories or that he is otherwise liable for crimes against humanity or war crimes.
5. The Overview of the Case in Chapter IV demonstrates that Croatia had no plans to expel the Serb population from Croatia. On the contrary, Croatia was a victim of a Serbian JCE which from 1990-1995 had occupied and ethnically cleansed one-third of Croatia's territory and bombed its towns and cities. Croatia sought the peaceful reintegration of its occupied territory through the Vance Plan, which was time and again sabotaged by the Serbian JCE, as were all efforts to resolve the conflict through peaceful negotiations. The Serbian JCE used propaganda to instill fear of Croatia among Serbs so as to justify the legitimacy of the RSK as part of "Greater Serbia." Consequently, although Croatian citizens of Serb ethnicity enjoyed special constitutional protection and held senior positions in government, many "Krajina" Serbs took up arms against Croatia and rejected Croatian citizenship *en masse* in favour of the citizenship of a hostile enemy, the FRY⁶-RSK.
6. Chapter IV also sets forth GOTOVINA's role as operational commander of joint HV-HVO⁷ forces in Bosnia and Croatia throughout 1995. As a result of attacks against the Bihac Pocket which began in November 1994,

⁵ The Serbian JCE is outlined in Section IV.A.

⁶ Federal Republic of Yugoslavia.

⁷ Bosnian-Croat Army.

GOTOVINA led a series of operations in 1994-1995 intended to counter the Serb offensives on Bihac, culminating in the capture of Grahovo in late July. In the days before Storm, the RSK leadership established a four part strategy: (1) launch a counteroffensive named Vaganj to retake Grahovo; (2) use peace negotiations in an effort to delay a Croatian offensive until Vaganj could be implemented; (3) seek international intervention against a Croatian offensive; and (4) evacuate the population to Bosnia and Serbia as a last resort.

7. The Croatian leadership was aware of Vaganj and provided Serb rebel leaders an ultimatum: peacefully reintegrate into Croatia's constitutional order, or else military consequences would follow. TUDJMAN, knowing that Croatia would suffer no diplomatic consequences for launching Storm if Croatia complied with U.S. Conditions – which included the protection of Serb civilians and UN peacekeepers – issued strict orders to JARNJAK and SUSAK to ensure maximum protection for Serb civilians. This order was passed to all civilian and military institutions of Croatia, and refutes any claim by the Prosecution that TUDJMAN or Croatia had a secret desire to unlawfully expel the Serbian population.
8. Chapter V establishes the Prosecution's failure to prove the existence of a JCE. There was no agreement to expel Serbs at Brioni. Rather, like GALBRAITH, the Brioni participants understood that Serb civilians would depart as a result of RSK evacuation plans and the fear of Croatia induced by the propaganda of the Serbian JCE. There was never an intention for mass-expulsion. In order to avoid a siege that would inevitably result in significant civilian and military casualties, TUDJMAN at Brioni ordered that Serb civilians should not be trapped in encirclement by the HV but should be allowed to leave. This order was consistent with sound military doctrine, humanitarian law, and relevant Security Council resolutions. There was never a discussion at Brioni about using unlawful means to expel civilians.
9. There is no evidence whatsoever in support of the Prosecution's core JCE theory of mass-expulsion of Serb civilians by unlawful shelling and terrorization. The HV used artillery solely against military objectives in a highly professional operation consistent with well-established military

doctrine. The Prosecution has failed to prove in even a single instance that the “only reasonable explanation of the evidence” is that the HV employed unlawful shelling to cause Serb civilians to flee. Furthermore, the Prosecution has failed to prove that any unlawful psychological operations (“Psy-Ops”) were directed at Serb civilians. In fact, the only evidence of Psy-Ops directed at Serb civilians during Storm is TUDJMAN’s repeated call to Serb civilians and soldiers to stay in Croatia, promising them a general amnesty and full protection of their civil rights.

10. The evidence in Section V.D.iii proves that Serb civilians did not leave the occupied territories because of terrorization by the HV, but because of an RSK evacuation plan. A detailed, hour-by-hour chronology of events on 4 August establishes beyond doubt that the evacuation order was not issued to protect civilians from indiscriminate shelling (as the Prosecution claims), but because by 16.00 hrs the HV breakthroughs on the Dinara and Velebit mountains threatened to encircle the southern part of the “Krajina,” trapping ARSK soldiers and civilians in Croatia with no escape routes to Bosnia or Serbia. The Serbian JCE chose to evacuate all Serb civilians to Bosnia rather than face encirclement and reintegration into a multiethnic Croatian State.
11. Without proof of large-scale unlawful shelling and mass-expulsion, there is no other basis for inferring an agreement to commit crimes at the Brioni Meeting.⁸ There is no statement whatsoever to prove a common intention to commit crimes against Serb civilians and property in the aftermath of Operation Storm. Nor can a JCE be inferred based on an alleged pattern of crimes against civilians and civilian property in light of the express and repeated orders by Croatian authorities, including GOTOVINA, to protect Serb civilians and property. The policy of Croatia was to maintain law and order and prevent the commission of crimes, not only because it was Croatia’s desire to do so, but also because Croatia had made this promise to the U.S.
12. Unlawful conduct following the operation was the result of a crime wave amidst the chaotic transition between the RSK’s collapse and the establishment of Croatian State institutions in the newly liberated territories.

⁸ On 31 July, TUDJMAN met with top military officials on the island of Brioni (“Brioni Meeting”).

These opportunistic crimes, the scale of which the Prosecution grossly exaggerates, were not organized or discriminatory, as they affected Croat and Serb property alike. Despite limited resources in a vast geographical area, Croatia adopted many measures to prevent and punish crimes.

13. GOTOVINA did not participate in any JCE to expel Serb civilians from Croatia, as he at all times conducted himself in accordance with the laws and customs of war including his deployment of artillery. Moreover, as set forth in Chapter VI, GOTOVINA did not contribute to a JCE by failing to act. The Prosecution alleges that GOTOVINA's alleged failure to take necessary and reasonable measures was so outrageous that the Trial Chamber should infer that he acted with the intention to support and encourage subordinates to burn and loot, and even kill, in furtherance of the objectives of the alleged JCE. As demonstrated in Chapters VI and VII, the inference suggested by the Prosecution cannot be sustained in light of the numerous orders, admonitions and measures taken by GOTOVINA before, during, and after Storm to prevent and punish crime.
14. Similarly, as outlined in Chapter VII, there is no evidence to sustain a conviction based on command responsibility. The Prosecution has failed to prove in the overwhelming majority of cases that the perpetrators of crimes were subordinates of GOTOVINA. Moreover, the evidence demonstrates that at most times relevant to the indictment period GOTOVINA was an operational commander conducting large-scale military operations in Bosnia. As such, he did not have effective control over subordinates in Croatia who may have been committing crimes. GOTOVINA, as Split Military District ("Split MD") commander of some 30,000 troops, was too remote from perpetrators in the chain of command to exercise effective control. The evidence proves that his orders to prevent and punish crime were often not fully implemented due to a lack of skilled non-commissioned officers ("NCOs") and lower level officers in the newly established HV, thus limiting his material ability to prevent and punish crime. Moreover, GOTOVINA was not operationally tasked with restoring law and order in the liberated areas, which was left to other State institutions. Key domestic and international

actors, including LAUSIC, MORIC, BUHIN, CETINA, LUKOVIC, KARDUM, FORAND, FLYNN, AL-ALFI, BOUCHER and others all testified that they did not perceive GOTOVINA to be responsible for restoring law and order in the area and never contacted him to address the issue.

15. It is unreasonable to expect GOTOVINA to be both an occupying commander in Bosnia, and in charge of complex combat operations in Croatia and Bosnia, and to be further responsible for law and order in newly liberated territories in Croatia.
16. The Prosecution case alleges that Gotovina did not either prevent or punish crimes by his subordinates. The evidence demonstrates to the contrary that GOTOVINA at all times possessed a “genuine intent to prevent or punish crimes” committed by subordinates. Within the limited scope of his responsibilities, GOTOVINA took all necessary and reasonable measures to prevent and punish crime. He established training centers for NCOs and provided training in international humanitarian law to subordinates. On the eve of Storm incidents of burning and looting in Grahovo were reported to SUSAK and the Military Police (“MP”) and GOTOVINA replaced the commander of OG North in order to improve command and control. He issued repeated orders before and during Storm ordering the prevention of all crime and maximum correctness toward civilians. Consistent with GOTOVINA’s efforts, international observers in Knin reported that HV soldiers were treating civilians in an appropriate manner.
17. Unfortunately, some HV unit commanders were unable to prevent property crime during Storm. In response, GOTOVINA verbally reprimanded subordinate commanders for not maintaining proper discipline of troops; urged the MP, Political Affairs Department, and SIS to take all steps necessary to enforce the Rules of the Armed Forces; ordered the proper registration of all war booty; ordered that all crime be videotaped and photographed for future investigation; and ordered that soldiers be prohibited from roaming the liberated areas without the knowledge of their commanders. When a commander was unable to enforce these orders, GOTOVINA ordered the complete demobilization of the entire regiment. There is no evidence of HV

units engaging in criminal activity in Croatia after GOTOVINA ordered demobilization of undisciplined soldiers, thus evidencing that GOTOVINA took all necessary and reasonable measures under the circumstances.

18. The evidence demonstrates that under GOTOVINA's command there was a 151% increase in disciplinary measures taken during the time period relevant to this indictment. Furthermore, the Split MD took more disciplinary measures than any other military district in the HV in 1995. For all of the reasons set forth herein, the Trial Chamber cannot conclude that the "only reasonable interpretation of the evidence" is that GOTOVINA had "no genuine intent to prevent or punish crime."
19. In Chapter VIII, the evidence shows that the Prosecution has failed to prove its case on each individual count of the Joinder Indictment ("JI"). With respect to the charges of Murder, Cruel Treatment and Inhumane Acts, the Prosecution has failed to prove that these crimes were committed by GOTOVINA's subordinates or that GOTOVINA knew or had reason to know that those crimes were committed by his subordinates.
20. The Prosecution has failed to prove its case beyond a reasonable doubt. For all of the reasons set forth below, the Trial Chamber must enter a verdict of not guilty on all counts of the JI.

III. Standard of proof

21. The Prosecution must prove its case beyond reasonable doubt. The Trial Chamber must be satisfied that "there is no reasonable explanation of the evidence other than the guilt of the accused."⁹ Where more than one inference is reasonably open on the facts, one of which is consistent with innocence, it must result in an acquittal.¹⁰

IV. Overview of the case

22. The Prosecution case is based on the false premise that Croatia intended to forcibly displace its Serb population. It contends that TUDJMAN "didn't

⁹ *Martic*, AJ, para.61.

¹⁰ *Martic*, AJ, paras.58,59; *Boskoski*, AJ, para.271.

want Serbs in Croatia, and neither did those he surrounded himself with who were likewise convinced, like him, that Croatia was better off without Serbs.” This is the context within which it alleges that GOTOVINA participated in a JCE to create an ethnically pure Croatia through Operation Storm.¹¹

23. The Prosecution itself has admitted in other cases that Croatia did not pose a threat to the “Krajina” Serbs and that this perception was encouraged by Serbian propaganda to create mutual fear and distrust among Serbs and Croats to justify creation of ethnically pure States.¹²
24. The background facts demonstrate that most of the Prosecution’s allegations are unfounded:
 - a. Croatia had no plan or policy to expel its constitutionally protected Serbian population, but instead was a victim of Serbian aggression and wanted to reintegrate its occupied territory peacefully;
 - b. Croatia pursued a military option only after UN failure to halt Serbian aggression to avoid permanent loss of its sovereign territory;
 - c. Serbs who departed during Operation Storm were not “Croatian citizens”¹³ but citizens of a hostile enemy (*i.e.*, FRY-RSK) engaged in armed conflict with Croatia;
 - d. The RSK did not offer “little or no resistance,”¹⁴ but, on the contrary, was determined to defend and counter-attack against GOTOVINA’s forces, and to evacuate the civilian population if defeated; and
 - e. GOTOVINA was engaged in combat as an operational commander in Bosnia from Fall 1994 until November 1995,

¹¹ 98bis, T:17382:14-17.

¹² D-1773, paras.31-32.

¹³ Prosecution Pre-Trial Brief, 23.March.2007, (“PTB”), para.46.

¹⁴ Joinder.Indictment.(“JI”), para.32.

and did not have authority to establish law and order in liberated areas.

A. The Serbian JCE's takeover of lands in the Republic of Croatia

i. Background

25. Operation Storm marked the beginning of the end of the JCE led by Slobodan MILOSEVIC, Radovan KARADZIC, Ratko MLADIC, Milan MARTIC, Vojislav SESELJ and others (the "Serbian JCE"), which for five years attempted to carve out "a State for all Serbs"¹⁵ on the territory of the former Yugoslavia through campaigns of persecution, deportation, murder, mass burnings and plunder. The events leading to Operation Storm demonstrate the logical fallacy at the core of the Prosecution's case: that the "Krajina" Serbs would have stayed in Croatia but for the conduct of Croatian forces. To the contrary, the Serbian JCE designed policies to convince the Serb population that peaceful coexistence with Croats was impossible and that it was better to depart rather than live in a unified Croatia. Consequently, the overwhelming majority of Serbs had no desire to stay in a sovereign Croatia under any circumstances.
26. The objective of Operation Storm (reintegration of the "Krajina") should not be confused with its consequences (the departure of the "Krajina" Serbs),¹⁶ an error consistently made by the Prosecution. Indeed, the Prosecution does not dispute Croatia's legitimate right to launch the military operation to reintegrate the "Krajina" into Croatia, but argues instead that Operation Storm's secondary criminal objective was to "drive out the Serb civilian population and ensure their permanent removal."¹⁷
27. The facts contradict the Prosecution's position. Faced with military defeat, it was the RSK that ordered the evacuation of the "Krajina" Serb population.

¹⁵ D-1736, pgs.4-5; pg.17, paras.28-29; pgs.72-74; D-1645, pg.16.

¹⁶

¹⁷ Prosecution.Opening.Statement,("POS"),T:418:4-7.

ii. **Creation of RSK as part of “Greater Serbia”**

28. The Croatian Serb efforts to forge a separatist state began on 28 February 1989, more than one year before Croatia’s first parliamentary elections.¹⁸ The Serbian Democratic Party (“SDS”) in Croatia was created on 17 February 1990, with a platform that foreshadowed ethnic division by evoking the exaggerated threat of genocide.¹⁹ In taking the first steps toward ethnic separation, Serb leaders in the “Krajina” pushed for greater ethnic identification while simultaneously portraying Croats in ever more threatening ways.²⁰ The SDS policies led to one inevitable result: the definition of territory in ethnic terms, separation and confrontation.²¹
29. During 1991, Serb leaders in the “Krajina” refused to consider any solutions that would have offered autonomy, insisting instead on a separate state.²² After 19 December 1991, the Serbian Autonomous Oblast (“SAO”) “Krajina” became known as the RSK, and on 26 February 1992 two other Serb autonomous districts in Croatia – the SAO Western Slavonia and the SAO Slavonia, Baranja, and Western Srem – also joined the RSK. Thus, in less than two years, the Serb leadership in “Krajina” managed to create a separate Serb state on the territory of Croatia from Eastern Slavonia to Drnis.²³

¹⁸ [REDACTED] D-12.

¹⁹ D-1625, para.20.

²⁰ D-1773, para.23.

²¹ D-1773, para.26.

²² D-1773, para.30.

²³ D-1773, para.30.

iii. Use of propaganda by Serbian JCE

30. The advance toward ethnic division was facilitated by the rhetoric of Serb leaders and media, who encouraged ethnic separation, created fear among the Serb people, cast the Croatian authorities in a threatening light, and blurred the line between the Croatian authorities and the Croatian people.²⁴ Such propaganda served as a wedge between the Serb and Croat people and its effect was separation, mutual fear and distrust.²⁵
31. One widely used tactic was to declare that the Serb people were threatened by the newly-appointed Croatian government.²⁶ BABIC testified that during 1990, the Serb media consistently reported about the genocide perpetrated by the *Ustasha* regime of the Independent State of Croatia (“NDH”) in the 1940s and about the suffering of the Serbs, coupled with an erroneous equation of the new Croatian government with the NDH.²⁷ BABIC stated that the constant reference to Croatian authorities as “*Ustashes*” inevitably affected the perception of Serb people, and as a result Serbs first felt “uncertainty” and then “animosity” towards the Croatian government and “hatred” towards the Croatian people.²⁸ BABIC also testified that the propaganda “fed Serb fears of the new Croatian authorities and they made them want to somehow defend themselves from Croatia.”²⁹
32. Ambassador GALBRAITH testified that Serbs were subjected to “vehement anti-Croat...propaganda of the Serb leadership, which...inaccurately equated TUDJMAN’s Croatia with the *Ustasha* regime.”³⁰ In an effort to stigmatize the enemy and to instigate ethnic hatred, Serb television viewers were led to believe that the Croatian people were all genocidal.³¹ LAZAREVIC testified that the Serb leadership told the Croatian Serb public what they could expect if the Croats were to return to power,³² and that “people were so terrorized by

²⁴ D-1773,para.31.

²⁵ D-1773,para.31.

²⁶ D-1773,para.32.

²⁷ D-1773,para.32; D-1736,pgs.221-224.

²⁸ D-1773,para.33; D-1736,pg.224.

²⁹ D-1773,para.34; D-1736,pg.223.

³⁰ Galbraith,T:5051:10-20.

³¹ D-1645,pg.62.

³² Lazarevic,T:18025:12-18026:25.

their own government's propaganda, that few would have risked staying in Croatia."³³ The Croatian leadership was well aware that, because of this indoctrination, many Serbs had no wish to accept the Croatian state.³⁴

33. DE LA BROSSE, a Prosecution expert witness in another case, testified that:

[The] totalitarian dimension and the particularity of the propaganda used by Slobodan Milosevic's regime from 1987 onwards reside in the desire to bring together the Serbian ethnic group within a single State and therefore implicitly to drive the non-Serbian populations out of all the territories in which Serbs lived whilst re-joining these territories to 'historical Serbia.'³⁵

[C]ontrol over the most important broadcasting channels would be accompanied by a method combining propaganda, partial (and biased) information, false news, manipulation, non-coverage of certain events, etc. This entire arsenal would be mobilized to help justify the creation of a State for all Serbs – and so legitimize an ethnic policy which was presented as a fight for freedom, a measure taken to protect the Serbian people's native soil – and, lastly, reinforce the power and position of the Milosevic regime.³⁶

34. [REDACTED] [REDACTED] fear was deliberately fueled by local Serb leaders as a political instrument.³⁸ Anti-Croat hate propaganda was thus fundamental to the legitimacy of "Greater Serbia" and the consequent rejection of Croatian citizenship in favour of FRY-RSK citizenship.

³³ D-1461(Lazarevic),pg.33.

³⁴ Granic,T:24665:14-23.

³⁵ D-1645,pgs.13-15.

³⁶ D-1645,pg.29.

³⁷ Protected Witnesses are referred to herein as "PW-[Witness Number]."

³⁸ [REDACTED]

iv. Serbian JCE in Croatia controlled from Belgrade

35. With the assistance of the MILOSEVIC-controlled Yugoslav National Army (“JNA”),³⁹ along with Serbian paramilitary forces and Bosnian Serb volunteers, Croatian Serbs seized approximately one-third of Croatian territory and cleansed the area of its ethnic Croats.⁴⁰
36. From August 1990, a parallel structure emerged in the “Krajina” comprising members of the Ministry of Interior of Serbia and the State Security service of Serbia (collectively the “DB”), the SDS in Croatia and policemen answerable to Slobodan MILOSEVIC.⁴¹ Through this parallel structure, whose members included MILOSEVIC, Jovica STANISIC, Frenki SIMATOVIC, MARTIC, Dragan VASILJKOVIC, KARADZIC, and others, MILOSEVIC manufactured incidents which provoked reaction and fear among the Serbs.⁴²
37. The arming and training of Serbs in Croatia was organized in Belgrade and began by August 1990.⁴³ As early as March/April 1991, local Serbs, in particular MARTIC’s Police, volunteers from Croatia, Bosnia and Serbia and other special units started to train in camps, and were then deployed throughout the targeted territories in Croatia.⁴⁴ The local Croatian Serb population was covertly armed by the Serbian JCE, with weapons smuggled from Territorial Defence to Croatian Serb villages.⁴⁵
38. In spreading Serbian JCE camps throughout the “Krajina,” SIMATOVIC established both a military camp near Knin in Golubic⁴⁶ and a “private base” in Kistanje, while Captain DRAGAN set up a training camp in the Benkovac area.⁴⁷

³⁹ The JNA became known as the Yugoslav Army (“VJ”) following the breakup of Yugoslavia.

⁴⁰ Many of the same personalities that were relied upon by the Croatian Serbs to implement the policy of ethnic separation, such as MILOSEVIC, Jovica STANISIC, ARKAN, and Vojislav SESELJ would later re-appear in Bosnia. KARADZIC worked with MILOSEVIC to ensure that Croatian Serb leaders Milan BABIC and Milan MARTIC followed the strategic line, and KARADZIC mobilized his municipality chiefs to supply manpower to fight in Croatia. **D-2019**,pg.1; **Galbraith,T:4916:2-4**.

⁴¹ **D-1736**,pg.4,para.16.

⁴² **D-1736**,pg.4,para.16.

⁴³ **D-1625**,paras.29,66-95.

⁴⁴ **D-1625**,para.29.

⁴⁵ [REDACTED]

⁴⁶ **D-1736**,pg.89.

⁴⁷ **D-1736**,pg.95.

v. **Serbian JCE's crimes in Croatia**

39. BABIC admitted that Croats were persecuted by the Serbian JCE and that innocent people were forcibly evicted from their houses and/or killed.⁴⁸ At least 14,000 Croats were killed with 36,000 wounded.⁴⁹ In addition, Croatia was burdened by at least 380,000 refugees exiled by the Serbian JCE.⁵⁰
40. Witness KARDUM estimated that 12,000 houses belonging to Croats in UN Sector South ("Sector South") were destroyed from 1990 to 1995.⁵¹ The property destruction was so thorough that even stones of houses and churches were looted and taken away.⁵²
41. By November 1993, the UN reported that of the 44,000 Croats who had lived in Sector South in 1991, only 1161 remained.⁵³ Between 600-700 Croats and non-Serbs were killed during the UN peacekeeping mission in the area.⁵⁴
42. BILIC testified that when the Serbs entered his village, 200 people were rounded up, their feet shot at, and they were forced to leave the village over rugged terrain.⁵⁵ In addition, he stated that ten of his family members were murdered.⁵⁶

My village was surrounded by the Serb villages such as Lisane, Krkovic, Pedancovci [phoen]. So the Croatian villages were surrounded by the Chetnik (sic) or Serb villages, whatever you want to call them. Everything that had been stolen from us, starting with our chicken, tractors, livestock, equipment, appliances ... I was from a poor family, a village family, but we had 18 sheep, two cows, two calves, an Arsis [phoen] tractor. We had wine and prosciutto and were left without anything. Even the stone from the walls of the house was taken away. They cut down the trees, killed off everything.⁵⁷

⁴⁸ D-1736,pg.16.

⁴⁹ Granic,T:24665:14-23.

⁵⁰ D-1451.

⁵¹ Kardum,T:9498:23-9499:19.

⁵² D-1815,pgs.10-11.

⁵³ D-1361,pg.21,para.147.

⁵⁴ Granic,T:24627:12-24628:1.

⁵⁵ Bilic,T:19641:3-9.

⁵⁶ Bilic,T:19575:9-22.

⁵⁷ Bilic,T:19568:13-19569:8.

43. The Serbian JCE also shelled Croatian cities and towns throughout the four year occupation, including Zadar, Sibenik, Biograd, Gospic, Karlovac, and others.⁵⁸

vi. VJ-VRS-ARSK-DB: Part of the same structure

44. The VJ, VRS,⁵⁹ ARSK and DB worked together to achieve the common purpose of the Serbian JCE, a common Serbian state. This joint effort included providing personnel, financial support, and combined combat initiatives. For instance, in 1992 MARTIC's forces fought in Bosnia to open the so-called Posavina Corridor,⁶⁰ a strategically important link for connecting the Serbs of the RSK to the Serbs of the Republika Srpska ("RS") and then Serbia proper.⁶¹

45. In November 1994, the VJ-VRS-ARSK-DB launched a coordinated attack on the Bihac Pocket, foreshadowing an attack on Bihac in July 1995 that would set the stage for Operation Storm.

46. The February 1995 Directive on the Use of the ARSK stated that in the event of an HV attack, the VJ, VRS and ARSK would all work in a coordinated manner against the HV.⁶²

47. Belgrade provided tens of millions of Deutschmarks in assistance to the RSK,⁶³ and the FRY provided military material and equipment to the ARSK. General MRKSIC reported that even in late August 1995, the ARSK was still part of the VJ,⁶⁴ and most ARSK officers were financed by the VJ.⁶⁵ For example, NOVAKOVIC sought citizenship of Serbia as a "VJ officer serving in the ARSK"⁶⁶ and reported that his permanent post was Belgrade even while serving in the ARSK.⁶⁷

⁵⁸ D-1361, paras. 161-162.

⁵⁹ Army of Republika Srpska.

⁶⁰ D-1736, pg. 111.

⁶¹ D-1736, pg. 111; D-2019, pg. 1.

⁶² D-944, pg. 8.

⁶³ D-1736, pgs. 47-48, 52.

⁶⁴ D-923, pg. 28.

⁶⁵ D-1736, pgs. 52, 59, 165-166, 217-221.

⁶⁶ D-920.

⁶⁷ D-921.

48. BABIC testified that from August 1990 to August 1995, the relationship between the ARSK and the VJ remained the same: MILOSEVIC appointed the ARSK commanders.⁶⁸ MRKSIC himself testified that he had been appointed in May 1995 at a meeting with MILOSEVIC.⁶⁹ Days before Operation Storm, the commander of the ARSK's 7th Knin Corps was replaced by General KOVACEVIC, a VJ general from Serbia.⁷⁰
49. According to MRKSIC, "[t]here were general tasks which were imposed by President MILOSEVIC, who was an authority for all Serbian lands. To that effect, we were not, in fact, economically able to do anything without assistance."⁷¹ NOVAKOVIC's letter of January 1994 makes clear that VJ officers serving in the ARSK were still members of the VJ, and those refusing to serve in the ARSK would be retired within six months or else would lose their active duty status.⁷²

B. The UN failure to halt Serb aggression

i. Croatia's goal for the peaceful reintegration of "Krajina" through the Vance Plan was intentionally sabotaged by the Serbian JCE with no effective UN response

50. The primary aim of TUDJMAN's HDZ party was to achieve independence for Croatia (a goal defined in territorial or republican, not ethnic, terms).⁷³ The Prosecution has admitted that the HDZ platform advocated the transformation of the Republic of Croatia into a multi-party state, with basic rights and liberties for every citizen regardless of nationality, religion, or political beliefs.⁷⁴
51. Contrary to the Prosecution's claims, Croatia did not have a discriminatory policy towards Serbs. Croatian citizens of Serb ethnicity enjoyed special constitutional and minority rights.⁷⁵ Ethnic Serbs occupied important public

⁶⁸ D-1736,pg.99.

⁶⁹ Mrksic,T:18752:18-18753:4; D-1736,pgs.119-120.

⁷⁰ Mrksic,T:18876:3-11.

⁷¹ Mrksic,T:18809:4-17.

⁷² D-940.

⁷³ D-1773,para.25.

⁷⁴ D-1773,para.25.

⁷⁵ D-836.

offices including a Minister in the Government and a Vice-President of Parliament.⁷⁶

52. The Prosecution disregards that Serbs in the “Krajina” did not consider themselves Croatian citizens. They were dual citizens of FRY-RSK, entities that were at war with Croatia.⁷⁷ Their rights to acquire Croatian citizenship were obviously conditioned on acceptance of the Croatian State.
53. Contrary to the Prosecution allegations, TUDJMAN had no intention to expel the Serbs from Croatia as evidenced in Croatia’s decision in January 1992 to peacefully reintegrate the “Krajina.” Pursuant to the Vance Plan, expelled Croats were to be returned to their homes, the UN Protected Areas (“UNPAs”) were to be demilitarized, and the UN was to protect the human rights of all residents and keep them free from armed attack.⁷⁸
54. From the outset, the Serbian JCE intentionally sabotaged the Vance Plan. BABIC testified that the Serb authorities did not allow Croats to return to their villages, and MILOSEVIC not only did not want the demilitarization provisions put into effect, but supported the creation of military formations and the creation of the ARSK.⁷⁹
55. The Serbian JCE rejected all attempts at peaceful reintegration of the “Krajina.” LAZAREVIC, a member of the Serb delegation at international peace conferences, testified that “Belgrade did not want any settlement of issues that divided the RSK Serbs and the Croatian government,” and therefore “[m]ost of the time we were told not to agree to anything.”⁸⁰
56. The UN not only failed to implement the Vance Plan, but also failed to prevent ethnic cleansing by the Serbian JCE from continuing in the UNPAs.⁸¹ GALBRAITH recognized that the UN would not act without the approval of

⁷⁶ D-60,pg.26; Bagic,T:26612:1-14.

⁷⁷ D-1761; Granic,T:24677:10-25;24713:19-24714:9;24714:22-24715:8;24716:15-24719:23.

⁷⁸ D-698,pg.15,paras.7-20. The Security Council repeatedly expressed its support for Croatia’s sovereignty and territorial integrity: D-697; D-700.

⁷⁹ D-1736,pg.100-101.

⁸⁰ D-1461(Lazarevic),pg.16.

⁸¹ Granic,T:24627:12-24628:1.

the Bosnian Serbs,⁸² and by June 1995 a UN spokesman admitted that the Serbs were calling “a lot of the shots.”⁸³ GALBRAITH indicated that the UN remained willfully blind to the ongoing ethnic cleansing by the Serbian JCE, so as to avoid a duty to intervene to stop it: “[t]he United Nations always needed proof, and they had strategies to ensure that there was no proof.”⁸⁴

ii. UN’s conduct in Sector South

57. The UN effort to implement the Vance Plan in Sector South produced the same ineffective results as it did in other areas. To compromise the UN’s work, RSK intelligence operatives became interpreters working for the UN.⁸⁵ LAZAREVIC testified that some ECMM⁸⁶ and UN personnel were recruited as “cooperating agents” of RSK intelligence.⁸⁷ UN Public Information Officer (“PIO”) for Sector South, Alun ROBERTS, admitted that Sector South employed an interpreter despite knowing of his involvement with RSK intelligence.⁸⁸
58. UN troops sold as much as one million liters of fuel per month to the Serbs on the black market,⁸⁹ while the Sector South Chief of Staff Canadian Colonel Andrew LESLIE authorized the payment of 500 liters of fuel to the Serbs in exchange for an observation post.⁹⁰
59. ROBERTS held UN news conferences under an RSK flag in the ARSK press center, rather than under a UN flag in the Sector South Headquarters as required.⁹¹ ROBERTS failed to explain the terms of the UN mandate to the local Serb authorities and population,⁹² and failed to publicize the ongoing ethnic cleansing of non-Serbs in Sector South. ROBERTS acknowledged that he could not find any record in English language press of having spoken about

⁸² P-458,pg.7; D-404.

⁸³ D-405.

⁸⁴ D-406,pg.4.

⁸⁵ D-1346; D-1353; D-1354.

⁸⁶ European Community Monitoring Mission.

⁸⁷ D-1461(Lazarevic),pgs.10-12.

⁸⁸ Roberts,T:7043:1-7044:14.

⁸⁹ Forand,T:4409:3-18.

⁹⁰ Bellerose,T:5890-92; D-513,pg.29.

⁹¹ D-699; D-696,pg.3.

⁹² D-1344,pg.2; D-1362; D-1363.

the ethnic cleansing of Croats from Sector South between September 1993 and 4 August 1995.⁹³

C. Croatia's exhaustion of peace negotiations and Gotovina's role as operational commander of combat activities in Bosnia and Croatia throughout 1994-1995

i. 1994: The prelude to war

60. From the outset of the war in Croatia and Bosnia, the Republic of Croatia had three basic strategic goals: (1) stop the war and prevent Serb aggression, (2) establish control within the internationally recognized borders of the Republic of Croatia, (3) and integrate the Republic of Croatia into the European and Euro-Atlantic community.⁹⁴
61. Although many UN resolutions called for the peaceful reintegration of the territory under RSK control, by 1995 it appeared that the UN would not be successful.⁹⁵ Accordingly, Croatia developed contingency plans to restore legitimate Croatian sovereignty in the event that the UN completely failed in its mission.⁹⁶
62. On the basis of the "Washington Agreement," a military alliance between Croatian and regular Bosnian forces, the Croatian military and political leadership, in late 1994, placed GOTOVINA in command of all Croatian forces involved in offensive campaigns against the VRS/ARSK.⁹⁷ The joint

⁹³ **Roberts,T:6996:6-6997:16;7123:2-5.** Frustrated by such behavior by UN personnel, especially PIO Roberts, GOTOVINA complained directly to the Sector South commanders about ROBERTS's conduct. GOTOVINA's dislike of ROBERTS predates Operation Storm and was based on ROBERTS's numerous shortcomings in fulfilling his duties.

⁹⁴ **D-1485(Zuzul),para.6.**

⁹⁵ **D-697; D-700.**

⁹⁶ **D-700; Akashi,T:21746:13-16** ("Q. Mr. Akashi, would you agree with me that repatriation of non-Serbs in Serb-held areas was one of the goals that the UN failed to do in the UNPAs? A. Yes, in that task UN did not accomplish its objective."); **Galbraith,T:5026:6-8,17-25;5024:15-23** (Galbraith testified that he had strong disagreements with the UN and was very frustrated with how it was conducting itself during these months. Galbraith stated that the UN failed in its mission to protect the safe areas and to stand up against the Bosnian Serbs, and it was also very unwilling to authorize NATO air-strikes.). **Galbraith,T:4919:18-25;4920:1-10** (In May to July 1995, things began to really fall apart. UN peacekeepers were taken hostage, there were attacks on Srebrenica and Zepa in July, and then the attack on Bihac, which was carried out by both the Bosnian Serb army and the ARSK. At that point, the Croatian government decided that it was opportune to recover Croatian territory).

⁹⁷ **Galbraith,T:4994:6-16** (During the negotiations of these plans, including the Washington Agreement, Tudjman agreed to negotiate in every instance that he was asked to negotiate.)4995:1-25(Once the agreement was reached, the fighting between the two sides ended immediately. In Galbraith's view, the Washington Agreement was the cornerstone of the Dayton Peace Agreement).

HV and HVO forces under GOTOVINA's operational command were known as the "Croatian Forces."⁹⁸ GOTOVINA remained in the position of operational commander until the fall of 1995. His first joint campaign was Operation Winter-94.

63. The Prosecution improperly attempts to paint GOTOVINA as a commander who had operational responsibility for ensuring law and order in the Croatian territories liberated after Operation Storm. To the contrary, he was an operational commander in charge of combat from November 1994 through the end of 1995.

ii. Winter-94

64. The mission of Operation Winter-94 in November 1994 was to reduce the Serb pressure on the ABiH⁹⁹ 5th Corps in the Bihac Pocket.¹⁰⁰ This was a critical Croatian strategic objective for two primary reasons. First, if the VRS/ARSK forces overran the Bihac Pocket, it would have caused a humanitarian disaster with massive civilian casualties and an influx of refugees to Croatia exacerbating its already monumental refugee burden.¹⁰¹ Second, preventing the fall of Bihac and defeat of the 5th Corps was essential to preventing a VRS/ARSK consolidation in western Bosnia integrating the RSK/RS into a single entity.¹⁰²

iii. January – March 1995

65. In January 1995 Croatia chose not to support the continuation of the UNPROFOR mandate because UNPROFOR failed to carry out the basic elements of the Vance Plan and further continuation would only impede the realization of Croatia's strategic goals.¹⁰³

⁹⁸ D-991;D-656; Theunens,T:12849:24-12850:13.

⁹⁹ Army of Bosnia-Herzegovina.

¹⁰⁰ Although declared a UN Safe Area, Bihac sustained attacks from joint ARSK and BSA armies for over one year.

¹⁰¹ P-444(Galbraith),paras.16,20; D-430(Mladic speaking about dealing with Bihac in the same fashion as Srebrenica); D-1485(Zuzul),paras.9,10,13.

¹⁰² D-728,pg.8; D-1466; Zuzul,T:18283:22-18285:3.

¹⁰³ D-1485(Zuzul),para.7.

66. In response, the “Zagreb 4”¹⁰⁴ presented a new peace proposal known as the Z-4 plan. GALBRAITH testified that “[t]he Z-4 plan called for significant autonomy for Serbs within Croatia but the Serb leadership demonstrated no desire to deal with the core issues such as accepting some level of autonomy while being re-integrated into Croatia. They played endless games to avoid serious negotiations and MARTIC seemed the main person behind these endless delays.”¹⁰⁵
67. In January 1995 TUDJMAN received the plan and agreed to negotiate on the basis of it, while MARTIC refused to even touch it, causing negotiations to break down irretrievably.¹⁰⁶ BABIC testified that MARTIC claimed MILOSEVIC instructed him not to consider the plan.¹⁰⁷
68. On 20 February 1995, the RS and RSK formed a “Joint Defence Council” in Banja Luka which was to be responsible for the defence of the people and the territories of the two Serb countries west of the Drina.¹⁰⁸
69. In March 1995, TUDJMAN agreed to a deal with U.S. Vice-President Gore, which resulted in a new UN peacekeeping mission in Croatia known as UNCRO.¹⁰⁹ While Croatia continued to remain open to peaceful reintegration, the HV took additional steps to prepare itself for the possible use of force.

iv. Operation Jump-1

70. In April 1995, Croatian Forces in Bosnia successfully executed the next offensive operation, Operation Jump-1.¹¹⁰ Under GOTOVINA’s command, the Croatian forces took approximately 75 square kilometers of territory, and laid the groundwork for the next campaign known as Operation Jump-2.

¹⁰⁴ P-451,pg.194.
¹⁰⁵ P-444(Galbraith),para.8.
¹⁰⁶ Galbraith,T:4919:10-17.
¹⁰⁷ D-1736,pg.108.
¹⁰⁸ P-1113,pg.304.
¹⁰⁹ D-1485(Zuzul),para.8.
¹¹⁰ P-1113,pg.306.

71. In April 1995, MILOSEVIC issued a direct order to MLADIC and MARTIC to cut off GOTOVINA's forces in the Livno Valley.¹¹¹

v. Operation Flash: The reintegration of Western Slavonia

72. On 1 May in UN Sector West, the HV launched Operation Flash to liberate Western Slavonia.¹¹² Both U.S. Envoy Richard HOLBROOKE and GALBRAITH supported Operation Flash because they "realised the strategic importance of that operation and the pressure it imposed on the Serbs..."¹¹³ In response, on 2 and 3 May, the ARSK fired rockets with cluster ammunition against Zagreb and Pleso Airport.¹¹⁴ On 4 May, a session of the RS/RSK Joint Defence Council, headed by MARTIC and Radovan KARADZIC, was held in Knin.¹¹⁵

73. In discussing the treatment of Serb civilians after Operation Flash, GALBRAITH told TUDJMAN that Croatia's conduct "earned you tremendous credit."¹¹⁶ [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

74. The Secretary General also reported positively about the actions of the Croatian government after Operation Flash:

¹¹¹ D-1736,pg.93.

¹¹² P-1113,pg.266.

¹¹³ P-449,pg.17.

¹¹⁴ P-1113,pg.266.

¹¹⁵ P-1113,pgs.304-305.

¹¹⁶ D-408.

¹¹⁷ [REDACTED]

¹¹⁸ [REDACTED]

Despite the evident efforts of the Croatian Government to achieve high standards of respect for the Serbs' human rights in Sector West and to discourage them from moving into Bosnia and Herzegovina, an atmosphere of fear prevails and only a few hundred are likely to choose to stay in the Sector. The Croatian police have reportedly conducted themselves properly and with concern for the remaining Serbs but there continue to be reports of harassment and intimidation, including looting and the burning of houses, when Croatian police are not present.¹¹⁹

75. Even with Croatia's efforts to respect human rights and encourage the Serbs to stay in Western Slavonia, UN elements disseminated exaggerated Serb propaganda alleging Croat atrocities and the expulsion of the Serb minority, propaganda which would repeat itself in August 1995.¹²⁰ In July 1995, Human Rights Watch criticized AKASHI for exaggerating claims of "massive" human rights abuses by Croatia.¹²¹
76. The Special Rapporteur of the Commission on Human Rights Tadeusz MAZOWIECKI¹²² and one of his subordinates E.J. FLYNN¹²³ confirmed that Serb civilians left Western Slavonia voluntarily, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
77. While Croatia was encouraging Serbs to stay, the Serbian JCE was desperately encouraging them to leave. BABIC told a UN official that Croatia was engaged in a "propaganda campaign to show how humane they are."¹²⁵ In a meeting with AKASHI, MARTIC insisted that the UN evacuate Serbs from Western Slavonia.¹²⁶

¹¹⁹ D-2020, para. 15.

¹²⁰ D-1668, pg. 2.

¹²¹ D-1668, pg. 2.

¹²² D-60, para. 28.

¹²³ Flynn, T:1296:21-1297:15.

¹²⁴ [REDACTED]

¹²⁵ D-1648, para. 1, 2.

¹²⁶ D-1647. In July 1995, MAZOWIECKI reported that the Serb leadership had insisted on the evacuation of 3000-4000 people from Western Slavonia. D-60, para. 28.

78. The UN agreed and organized Operation Safe Passage.¹²⁷ To ensure that the departures were voluntary,¹²⁸ the UN had the departing Serbs sign a document indicating the voluntary nature of the departure.¹²⁹ The UN implemented the same procedure in September 1995 when Serbs chose to leave Knin.¹³⁰
79. The Serb leadership then misused Operation Flash to frighten the Serb population remaining in the “Krajina.” [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

vi. **June 1995: Operation Jump-2**

80. Following the liberation of Western Slavonia, MILOSEVIC installed MRKSIC as the new ARSK commander.¹³³ Beginning in June 1995, MRKSIC’s task was to reorganize the ARSK so that by October 1995, “[w]e would have been able to inflict such losses as would have proved unbearable for the Republic of Croatia. They would have to give up on the idea of an attack and opt for a peace solution.”¹³⁴
81. For the Serb leadership, the conclusion of the war—the endgame—was approaching. In Bosnia, the RSK and the VRS were about to implement their final strategic initiatives in Srebrenica, Zepa, and Bihac. On 1 June, MRKSIC issued an order stating: “Soldiers and the officers of the RSK, *we are entering*

¹²⁷ D-60,pg.8; [REDACTED]; D-1649; D-1650,pg.3,4; D-1651,para.8.

¹²⁸ D-1651,para.8.

¹²⁹ Lazarevic,T:17988:10-18;21631:6-20.

¹³⁰ Skare-Ozbolt.T:18084:6-18085:7.

¹³¹ [REDACTED]

¹³² [REDACTED]

¹³³ D-1736,pg.99; Mrksic,T:18752:18-18753:4; D-1736,pgs.119-120. Both MRKSIC and MARTIC stated that they issued the evacuation order on 4 August because they “remembered what happened in Western Slavonia.” Mrksic,T:18935:7-18936:2; D-929,pg.2. MRKSIC reported that after Operation Flash there was great criticism that the evacuation of the civilian population had not been ordered earlier. D-923,pg.21.

¹³⁴ Mrksic,T:18829:12-23;D-923,pgs.1-2.

the concluding phase of accomplishing of our national aims and we must not allow any further losses of people or territory."¹³⁵

82. To counter Serb plans, from 4-8 June, GOTOVINA's Croatian Forces, facing the combined elements of the ARSK-VRS-VJ,¹³⁶ launched the third campaign, Operation Jump-2, with the aim of "expanding the free territory and directly threatening the towns of Bosansko Grahovo and Glamoč, as well as all the roads leading from Grahovo towards Glamoč and Knin."¹³⁷ They succeeded. Immediately thereafter, MRKSIC, MLADIC and PERISIC met on 10 June to plan an attack against GOTOVINA's forces in the Livno Valley.¹³⁸

vii. June – July 1995: Further Serb attacks on Bihac

83. Meanwhile, the combined Serb forces continued to fight in the Bihac Pocket. On 29 June, at a Serbian JCE meeting in Belgrade with *inter alia* MLADIC, MRKSIC, and PERISIC,¹³⁹ MILOSEVIC advised that the "Republika Srpska is ensured, we must seal it and place emphasis on the RSK and defend it."¹⁴⁰
84. At another meeting on 30 June, the plan to ultimately take the Bihac Pocket was finalized. MILOSEVIC told MLADIC, STANISIC, MRKSIC and Fikret ABDIC¹⁴¹ that "we must do something so he [Abdic] can take Cazin [in the Bihac Pocket], and then it will be easier later!"¹⁴²
85. Despite GOTOVINA's advances in the Livno Valley, MILOSEVIC decided that it was "important to resolve the [ABiH] 5th Corps as soon as possible, and then later to try cutting off [GOTOVINA] near Livno."¹⁴³ Even with MILOSEVIC's focus on Bihac, MRKSIC testified that he had insisted on the importance of the Livno Valley so that the Knin-Drvar axis would not be

¹³⁵ D-1509,pg.2(Emphasis added).

¹³⁶ D-811.

¹³⁷ P-1113,pg.309.

¹³⁸ D-1465,pg.175.

¹³⁹ D-1465,pg.201.

¹⁴⁰ D-1465,pg.201. MILOSEVIC also stated that he would give the Muslim-Croat Federation the areas of Vogosca and Ilijas around Sarajevo, and in exchange "we would enlarge on account of Fikret," meaning the Serbs would take at least some portion of the Bihac Pocket. D-1465,pg.203.

¹⁴¹ D-1465,pg.206.

¹⁴² D-1465,pg.206.

¹⁴³ D-1465,pg.208.

threatened.¹⁴⁴ MRKSIC believed that he was being “pushed” to fight in the Bihac area.¹⁴⁵ MRKSIC explained that Bihac was attacked rather than GOTOVINA’s Croatian Forces in the Livno Valley because the RSK was “thinnest in the stretch from Ogulin towards Bihac” and therefore “was not that difficult to capture.” Thus at the operational level “the hinterland [*i.e.* the Bihac Pocket] had to be assured so that he would have [his] back covered”¹⁴⁶ and create operational “depth” for the ARSK.¹⁴⁷

86. On 19 July the combined Serb forces launched Operation Sword against the Bihac Pocket.¹⁴⁸ For Croatia, the assault was the last straw,¹⁴⁹ and GALBRAITH testified that “the last thing the Croatians wanted was for Bihac to fall, because then you would have a single Western Serb entity, ‘Krajina’ and Bosnia.”¹⁵⁰ Foreign Minister GRANIC on 20 July wrote to the Security Council stressing the gravity of the situation from Croatia’s perspective.¹⁵¹
87. Both the United States and Croatia believed that the attack on Bihac was part of a coordinated set of attacks which also included Srebrenica and Zepa, and was designed to eliminate the enclaves.¹⁵² At a press conference in Knin on 30 July, MLADIC confirmed this conclusion stating that his intention was to “completely defeat the Muslims in Bihac as they were in Srebrenica and Zepa.”¹⁵³

viii. July 1995: Split Agreement, Operation Summer-95, and the fall of Grahovo and Glamoc

88. By 21 July at the London Conference, it was clear to ZUZUL that the international community would do nothing to stop the assaults on Srebrenica, Zepa and Bihac.¹⁵⁴ That same day, the German Foreign Minister and two

¹⁴⁴ Mrksic,T:18786:19-18787:21.

¹⁴⁵ Mrksic,T:18780:15-23; D-923,pg.3.

¹⁴⁶ Mrksic,T:18779:14-22.

¹⁴⁷ Mrksic,T:18779:18-18780:14;18805:4-8.

¹⁴⁸ D-923,pg.2.

¹⁴⁹ D-1991;D-1485(Zuzul),para.9.

¹⁵⁰ Galbraith,T:4922:13-14.

¹⁵¹ D-1808. U.S. assessments were that Croatia would move militarily to prevent the fall of Bihac. D-1581.

¹⁵² Galbraith,T:4927:5-9; P-1113,pg.337-338.

¹⁵³ D-430.

¹⁵⁴ D-1485(Zuzul),para.10.

American diplomats signaled to ZUZUL that a Croatian military response would be acceptable if it could be concluded within “5+2 days.”¹⁵⁵

89. On 22 July TUDJMAN and IZETBEGOVIC signed a mutual defence agreement in Split, calling upon Croatia to intervene militarily in Bosnia both to assist Bihac and to “continue coordination and cooperation in defence activities.”¹⁵⁶ With the signing of the Split Agreement, it was understood that GOTOVINA would be responsible for leading the efforts by Croatian Forces in the defence of Bosnia, and it would remain so until the Dayton Accords.¹⁵⁷
90. On 25 July, GOTOVINA launched Operation Summer-95 to relieve pressure on the Bihac Pocket by taking the strategically important towns of Grahovo and Glamoc.¹⁵⁸ The intention was to “halt the enemy offensive on Bihac”¹⁵⁹ by drawing Serb forces from Bihac towards the Livno Valley. MRKSIC testified that Operation Summer-95 achieved this intended effect, forcing MRKSIC to abandon Bihac to mount a defence in Livno.¹⁶⁰ The HV ran into “unexpectedly strong resistance,”¹⁶¹ and as a result Grahovo and Glamoc were not taken until 28 July.¹⁶²

D. Post Grahovo: The Serb strategy

91. The capture of Grahovo and Glamoc cut Knin off from its hinterland causing the ARSK to lose contact with the VRS 2nd Krajina Corps in Drvar, Bosnia and its supply line with the Bosnian Serbs. Links with Serb held ground were reduced to difficult, almost impassable routes, all within range of Croatian artillery.¹⁶³
92. The initial ARSK counterattack was scheduled for the final days of July 1995,¹⁶⁴ but was substituted for a major VRS/ARSK counterattack, Operation Vaganj, set for 5 August. At Brioni, the Chief of Croatian Intelligence

¹⁵⁵ D-1485(Zuzul),para.11.

¹⁵⁶ D-403.

¹⁵⁷ Granic,T:24728:12-24729:2.

¹⁵⁸ D-1581; D-1582; D-728; Herrick,T:20071:6-15;20072:1-13; [REDACTED]

¹⁵⁹ P-1113,pg.317.

¹⁶⁰ Mrksic,T:18811:25-18812:13.

¹⁶¹ P-458,pg.14.

¹⁶² P-1113,pg.319.

¹⁶³ P-1133,pg.294.

¹⁶⁴ D-161,pg.3; D-162.

Admiral DOMAZET accurately predicted that the Serb counteroffensive would commence after five days time.¹⁶⁵

93. Following the loss of Grahovo, the Serb leadership embarked upon a strategy with the following elements:

- a. Execute a joint VRS-ARSK counteroffensive (Operation Vaganj) to re-take Grahovo;
- b. Use negotiations to delay the eventual Croatian attack and to allow the Serbs to launch their counteroffensive;
- c. Hold out if attacked to have the international community force Croatia to cease hostilities in the interest of maintaining the status quo; and
- d. Evacuate the Serb civilian population if the Croatian offensive could not be stopped.

i. Operation Vaganj: Counterattack to retake Grahovo

94. On 28 July, MARTIC declared a state of war throughout the RSK.¹⁶⁶ On 29 July, a curfew was established in the RSK from 22.00 hrs to 05.00 hrs.¹⁶⁷ The curfew order was broadcast on TV,¹⁶⁸ as well as on the radio.¹⁶⁹ As a result there were no civilians on the streets at night in Knin and no cars other than UN vehicles.¹⁷⁰

95. On 30 July, the VRS-ARSK counteroffensive plans were prepared with MLADIC present in Knin to "arrange and coordinate further operations."¹⁷¹ At a press conference, MLADIC stated that the "Croatian formations have attacked and have entered Grahovo and partially entered Glamoc, but I do hope we will retake these and other occupied territories of Republika Srpska

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P-461,pg.19.

¹⁶⁶

D-119.

¹⁶⁷

D-241.

¹⁶⁸

¹⁶⁹

AI-Alfi,T:13879:14-13881:6.

¹⁷⁰

AI-Alfi,T:13879:14-13881:6.

¹⁷¹

D-402; D-1465,pg.239.

very soon.”¹⁷² An ARSK logistics officer’s diary entry for 30 July records a plan for a joint operation with the VRS to retake Grahovo¹⁷³ and BERIKOFF observed equipment and tanks in Strmica crossing over into Bosnia.¹⁷⁴

96. On 31 July, the ARSK noted in the Vaganj order that the VRS’s 2nd Krajina Corps in Drvar had been augmented by a unit from the VRS’s East Bosnia Corps.¹⁷⁵ Although there was a significant military presence already deployed in Strmica,¹⁷⁶ KOVACEVIC deployed additional ARSK units to Strmica,¹⁷⁷ while significant stocks of ammunition were moved for the offensive¹⁷⁸ and the 7th Knin Corps’s Forward Command Post (“FCP”) for Combat Group-3 was located in Strmica.¹⁷⁹
97. On the Croatian side, the Brioni Meeting attendees, aware of the Serb plans, knew that any delay would give the VRS time to transfer forces from Eastern Bosnia.¹⁸⁰ Miroslav TUDJMAN outlined the problem:

You must take into account that if this [Operation Storm] is postponed for two days that means that they will have four or five days until the end of the operation, they will have time to transfer these forces and you will be subject to an attack over there [Grahovo]. That’s their only chance to weaken the pressure on Knin.¹⁸¹

98. On or about 1 August, the ARSK executed a small tactical action in the area of Strmica.¹⁸²
99. On 2 August, a joint session of the RS/RSK Supreme Defence Council was held in Drvar¹⁸³ to discuss “further coordination of operations.”¹⁸⁴ MLADIC outlined the objective: “[b]ring up to strength and resupply at least *the units*

¹⁷² D-402. The participants in the Brioni meeting were aware of this statement by MLADIC. P-461,pg.3.

¹⁷³ D-161,pg.3; D-162.

¹⁷⁴ P-748,pg.4; Berikoff,T:7668:2-19;7669:16-7672:4; Hill,T:3810:25-3815:19.

¹⁷⁵ D-1974.

¹⁷⁶ D-338.

¹⁷⁷ D-159.

¹⁷⁸ D-160.

¹⁷⁹ D-238,pg.6.

¹⁸⁰ P-461,pg.28.

¹⁸¹ P-461,pg.28.

¹⁸² Mrksic,T:18843:9-18844:3.

¹⁸³ D-1465,pg.240; P-831; D-1274.

¹⁸⁴ D-1465,pg.240.

that will conduct the operation on the Livno axis, liberate lost territory, unblock the roads towards Knin and reach the April 1992 line.”¹⁸⁵

100. Also, on 2 August, MRKSIC planned the defense of the RSK¹⁸⁶ relying on MLADIC to execute Vaganj and rout GOTOVINA’s forces in Grahovo:

After losing Grahovo and Glamoc, the 2nd KK /Krajina Corps/ is rapidly conducting engineering work on positions for the defense of the Grahovo - Drvar axis. New forces are being rapidly brought in from depth and prepared for conducting a counterattack on HV /Croatian Army/ and HVO forces on the Grahovo Livno axis and the Glamoc - Livno axis.¹⁸⁷

101. MRKSIC decided to carry “out a persistent defence to slow down and prevent a possible attack by the HV on the chosen axes while simultaneously carrying out an operation to liberate the Knin—Grahovo—Drvar communication and take control of the Dinara ridge with the purpose of creating conditions for a more favorable treatment towards RSK’s interests in the negotiating process which has started.”¹⁸⁸ He then ordered his units to participate in Operation Vaganj.¹⁸⁹
102. MRKSIC mistakenly anticipated the main HV attack would be in UN Sector North, and deployed his mobile units (“KSJ”) accordingly¹⁹⁰ to prevent the “Krajina” from being bisected,¹⁹¹ and to defend against any attack from the coast. Because MRKSIC did not anticipate the main thrust to come from GOTOVINA’s forces over the Dinara, he deployed regular police officers not military units to defend that region.¹⁹² In addition, he anticipated that the VRS would tie up those HV forces with Vaganj.¹⁹³
103. On 3 August, ARSK intelligence reported to Belgrade:

¹⁸⁵ D-1465,pg.248(Emphasis added).

¹⁸⁶ D-1515.

¹⁸⁷ D-1515,pg.2.

¹⁸⁸ D-1515,pg.2.

¹⁸⁹ D-1515,pg.2.

¹⁹⁰ D-1515,pg.3; Mrksic,T:18838:22-18839:4.

¹⁹¹ Mrksic,T:19002:17-19003:7.

¹⁹² D-237; D-923,pg.6; Mrksic,T:18873:14-23; [REDACTED]

¹⁹³ Mrksic,T:18842:3-18843:3.

[T]he Chief of the Krajina Serb Army General Staff established contact with the forward command post of the Serb Republic Army General Staff in regard of the joint operations and planning of further offensive operations along the Grahovo-Livno axis. Concrete tasks have been agreed, yet we do not know when these tasks will be realized, since we have the impression that in the western part of the Serb Republic there are nearly no units capable of offensive operations, which the Serb Republic Army attempts to conceal.¹⁹⁴

104. On that same day, MLADIC issued his attack order Vaganj, to “liberate Grahovo and Glamoc” and to “cut off and destroy enemy forces in Glamocko Polje and Grahovsko Polje” which was to commence on 5 August at 06.00 hrs.¹⁹⁵ It never happened. Believing that he had been tricked, MRKSIC testified that MLADIC’s order was “wishful thinking” because VRS forces had to be redeployed from Eastern Bosnia, and this “took days. By that time, Knin had fallen, half of ‘Krajina’ had fallen, and all of ‘Krajina’ had fallen, in fact.”¹⁹⁶ In fact, Vinko PANDUREVIC’s VRS Drina Corps units did not arrive in Grahovo until 9 August.¹⁹⁷

ii. Serbs use international negotiations to buy time

105. At the same time, the Serb leadership engaged the international community in sham negotiations to create the false perception that they were willing to agree to peace. The goal was simple: buy time to re-deploy additional VRS forces from Eastern Bosnia and retake Grahovo.
106. On 30 July, while MLADIC was in Knin, AKASHI was also there to broker a peace agreement with MARTIC, who had reneged on a previous agreement with AKASHI.¹⁹⁸ Facing imminent attack and the need for more time to launch their own counterattack, MARTIC agreed to send an RSK delegation to Geneva.
107. On 2 August, BABIC met with GALBRAITH in Belgrade. GALBRAITH believed that BABIC was MARTIC’s “political opponent”¹⁹⁹ who might be

¹⁹⁴ D-1495,pg.1.

¹⁹⁵ D-1975.

¹⁹⁶ Mrksic,T:18869:7-23.

¹⁹⁷ D-1978,pg.1.

¹⁹⁸ D-1653,para.13.

¹⁹⁹ Galbraith,T:4931:19-21.

able to get the RSK parliament to accept the Z-4 plan over MARTIC's objections.²⁰⁰ However, as evidenced from telephone intercepts, BABIC was playing a game coordinated with MARTIC to delay the start of Operation Storm. Unbeknownst to GALBRAITH, BABIC and MARTIC were in constant coordination, as reflected in telephone intercepts of 3 August²⁰¹ and 4 August.²⁰² BABIC did not agree to the Z-4 plan but rather to "*negotiate on the basis of the Z-4 plan,*"²⁰³ a worthless agreement without the support of MILOSEVIC and MARTIC.²⁰⁴ While BABIC was "accepting" the Z-4 plan, MARTIC was instructing his chief negotiator in Geneva, PRIJIC, that "we cannot accept the Z-4 plan,"²⁰⁵ and to delay any agreement with Croatia, with "political talks beginning after the month of August" because "we are almost done."²⁰⁶

108. Thus, as the Vaganj orders were being issued, peace negotiations in Geneva were underway. By 14.00 hrs, the Serb leadership knew that Operation Storm would commence at 05.00 hrs the next day,²⁰⁷ yet they decided to reject peaceful reintegration, to implement Vaganj, and to rely on the international community to pressure Croatia into ending Operation Storm.
109. On the evening of 3 August PRIJIC stated publically that the Geneva negotiations had broken down because the Croatian side "insisted on the peaceful reintegration of 'Krajina' into Croatia."²⁰⁸

iii. Serb Plan: International intervention to stop Operation Storm

110. The Serb leadership believed that if attacked the ARSK could create a stalemate with the HV, and the international community would intervene to stop the Croatian offensive.

²⁰⁰ Galbraith, T:5000:19-25.
²⁰¹ D-1476, pgs. 1,4-5 ("Did you speak with Milan?").
²⁰² D-927.
²⁰³ P-444 (Galbraith), para. 25 (Emphasis added).
²⁰⁴ D-1736, pgs. 123:10-12; Galbraith, T:5003:2-11.
²⁰⁵ D-1476, pgs. 7-10.
²⁰⁶ D-1476, pg. 9.
²⁰⁷ D-923, pg. 5.
²⁰⁸ D-181; D-1395.

111. MRKSIC reported that the plan was to “hold out for five to seven days and to await intervention by international factors.”²⁰⁹ On 2 August MARTIC likewise expressed this goal:

Croatia will most likely conduct new aggression towards the RSK. We attempted to delay this by agreements and negotiations in order for it to be avoided. However, their position is precisely to gain support for a military solution in order to stabilize themselves within, and you know how much instability they are suffering. But if we succeed, and I sincerely hope this will be the case, and we wait "as a host" and defeat them, *then our recognition will be truly imminent. The RSK would then become the utmost reality*, it would be realistic that we be recognized worldwide and that Croatia be defeated, they would be forced to shake our hands and say, the RSK exists.²¹⁰

112. STANISIC even told MRKSIC to “hold on for a couple of days and that the international community would interfere and save Krajina.”²¹¹ LAZAREVIC similarly testified that the message received in Sector North from Belgrade was that the ARSK should “persevere.”²¹²
113. General FORAND agreed that the ARSK’s best defence was to “buy time” and that “the longer it would have taken the Croat[s] to retake the Krajina,...maybe... some external organization or country would step up and say, ‘OK, let’s stop the fighting and resume the discussion.’”²¹³

iv. Evacuation plans for Serb civilians

114. The last element of the Serb strategy, if all else failed, was the evacuation of the Serb population from the “Krajina.” As is more fully discussed in Section V.D.iii, the Serbs implemented detailed plans to evacuate all civilians in the area, plans which involved all levels of the RSK government. The planning set out: the zones to be evacuated, the routes to be followed, and a plan for the evacuation of municipal records.

²⁰⁹ D-923,pgs.3,14. NOVAKOVIC confirmed this. Novakovic,T:11763:21-25;11769:3-9.

²¹⁰ D-924(Emphasis added).

²¹¹ Mrksic,T:18955:17-22;18956:6-16.

²¹² D-1461(Lazarevic),pg.29.

²¹³ Forand,T:4358:1-4359:22. Both FORAND and the Serb leadership recognized that international intervention was critical. To this end, beginning on 4 August, both UNCRO and the ARSK made false and exaggerated claims regarding the HV offensive with the hope of triggering such an intervention. See *infra*.

E. UN and ICFY strategy after the fall of Grahovo

115. After the fall of Grahovo, the UN and the ICFY²¹⁴ co-chairmen STOLTENBERG and BILDT wanted to maintain the *status quo*; an interest shared with the Serb leadership.
116. Immediately after the Split Agreement, the UN ordered Operation Active Presence to deploy troops “at border crossing points and along potential axes of attack for the HV,” and ordered peacekeepers to “remain in location” and “not withdraw” during hostilities.²¹⁵
117. On 3 August, U.S. Ambassador Madeline ALBRIGHT stated critically that “the continued presence of United Nations personnel in exposed conditions reveals ‘ineptitude’ on [the UN’s] part and that [the UN’s] vulnerability ‘reduces the options’ of the international community.”²¹⁶ In fact, Active Presence was specifically designed to reduce the military options by putting peacekeepers in inevitable danger and to cause international condemnation of Croatia’s military offensive.
118. Active Presence was also intended to open the possibility of NATO intervention. UN General JANVIER told MRKSIC and MARTIC on 30 July that “NATO Close Air Support is available for [JANVIER] to use against any force attacking United Nations personnel.”²¹⁷ MRKSIC later used this information to try to draw NATO airstrikes, by alleging that the HV was shelling the UN²¹⁸ when the HV targeted ARSK positions that the ARSK been purposefully placed next to UN observation posts.²¹⁹ On 4 August AKASHI commented that he might call for NATO airstrikes against the HV.²²⁰
119. As set forth more fully *infra*, Croatia’s justified response to these UN activities in order to ensure their safety was to restrict the movement of UN personnel, remove UN peacekeepers from observation posts, avoid shelling

²¹⁴ International Conference on the Former Yugoslavia
²¹⁵ **D-288**,pgs.4,7; **D-1990**,pgs.4-5.
²¹⁶ **D-121**.
²¹⁷ **D-1653**,para.10.
²¹⁸ **D-331**.
²¹⁹ **P-546**(Bellerose),pgs.2-3; **Bellerose,T:5888:1-25**; **D-408**,pg.2.
²²⁰ **D-1654**,pg.1.

near the UNCRO barracks, and ignore much of the propaganda coming from the UN during and immediately after Operation Storm.

F. Croatia's decision to re-take the "Krajina"

i. The Brioni Meeting

120. With the seizure of Grahovo and Glamoc, time was of the essence and Croatia could not succumb to the typical Serb delay tactics. If it did so, it would lose the strategic advantage. The alternatives for Croatia were clear: either the Serbs agree to complete peaceful reintegration, or force would be used to liberate its territory.
121. On 30 July, AKASHI met with MARTIC in Knin, and misled Croatia and the international community into believing that MARTIC had agreed to conditions that would lift the siege of Bihac.²²¹ Despite his public pronouncements, AKASHI knew that MARTIC had made no such agreements.²²²
122. On 31 July, TUDJMAN met with top military officials on the island of Brioni. The HV had been prepared to launch an operation on 1 August to create a corridor to Bihac²²³ but TUDJMAN cancelled the mission because of AKASHI's false report, which publicly removed the purpose for the 1 August operation.²²⁴
123. After cancelling the 1 August operation, TUDJMAN called at the Brioni Meeting to consider military options for retaking Croatian territory if the Serbs refused to accept peaceful reintegration.
124. Contrary to the Prosecution's claims, the Brioni Meeting was not the meeting that "finalized military plans for Operation Storm."²²⁵ The final military

²²¹ **D-1474.**

²²² **D-1646(Akashi),para.4; D-1653.**

²²³ **P-461,p.g.2**("we should reconsider and modify our plan we envisaged for tomorrow");pg.2("but lets discuss whether we will undertake an operation tomorrow or in the next few days");pg.7("I suggest that instead of tomorrow morning, we start a day or two later"); **P-458,p.21.**

²²⁴ **P-461,p.g.1.**

²²⁵ **PTB,para.16**

planning meeting took place on 2 August in the War Room of the Ministry of Defence, where the entire military leadership was present.²²⁶

125. The Brioni Meeting will be discussed in more detail in Section V.C.

ii. The conditions of the United States

126. On 31 July, ZUZUL met in Washington D.C. with HOLBROOKE and Robert FRASURE²²⁷ and advised that Croatia “cannot allow the Serbs to regain initiative and bring into question the successes the HV had achieved.”²²⁸ After the discussion, ZUZUL concluded that if Croatia attacked there would be no diplomatic pressure or sanctions for launching Operation Storm, provided three conditions (the “U.S. Conditions”) were met:

- a. The operation was completed quickly;
- b. Maximum care was taken of the safety and human rights of civilians in the occupied areas; and
- c. Safety of UNCRO members was guaranteed.²²⁹

127. U.S. military attaché HERRICK delivered a similar message: if Croatia took care of civilians and completed the operation quickly, there would be no international repercussions.²³⁰

128. On 1 August, GALBRAITH delivered the same U.S. Conditions²³¹ to TUDJMAN and advised that the Serbs were not withdrawing from Bihac, were not respecting previous agreements, and that there was “no immediate optimism about negotiations on a political settlement.”²³² Per GALBRAITH, the U.S. wanted TUDJMAN to understand that if Croatia fulfilled these conditions, there would be no sanctions.²³³

²²⁶ D-409(Lausic),pg.3; P-2159(Lausic),para.151.

²²⁷ D-1485(Zuzul),para.14.

²²⁸ D-1485(Zuzul),para.14.

²²⁹ D-1485(Zuzul),para.16; Granic,T:24666:14-20.

²³⁰ D-1578(Herrick),para.20.

²³¹ D-408.

²³² D-407.

²³³ Galbraith,T:5039:2-11. The White House publicly confirmed the U.S. Conditions on 2 August. D-1490,pg.2.

129. GALBRAITH testified that TUDJMAN and the Croatian leadership would “weigh carefully” any decision to go to war and he knew that TUDJMAN would try to comply with the U.S. Conditions:

And in the build-up to Operation Storm, he wanted to be sure that Croatia was not going to end up isolated from the international community, that the Security Council would not condemn Croatia, the Security Council wouldn't impose sanctions. Like any good strategist, frankly, he wanted to consider all the consequences of what he was going to do and in every way minimise the risk.²³⁴

iii. Orders for strict compliance with U.S. Conditions

130. To ensure full compliance with the U.S. Conditions, on 2 August, SUSAK met with HV leaders and ordered them to take all measures necessary so as to avoid having to put heroes of the Homeland War on trial.²³⁵ To that end, he ordered MPs to energetically prevent offenses by HV members, MD commanders to pass along orders to prevent burning and looting, and that protection of civilians and prevention of crimes must be emphasized.
131. With these instructions, GOTOVINA ordered that his units (a) eliminate undisciplined behavior with a focus on preventing torching and destruction of property, (b) act properly with civilians and POWs in accordance with the Geneva Conventions, and (c) provide support to civilian institutions following the conclusion of combat operations.²³⁶
132. Prior to Operation Storm, booklets were given to HV units under the command of GOTOVINA detailing the Geneva Conventions.²³⁷ Additionally, Homeguard unit commanders issued orders to protect civilians and treat them properly.²³⁸

²³⁴ Galbraith, T:5041:14-5042:8. ZUZUL [REDACTED] confirmed that TUDJMAN wanted Operation Storm to be conducted in compliance with the U.S. Conditions in order to achieve Croatia's three strategic goals. D-1485(Zuzul), para.17; Zuzul, T:18325:1-22; [REDACTED]

²³⁵ D-409, pg.3; P-2159(Lausic), para.151.

²³⁶ D-201.

²³⁷ D-200(Babacic), para.6; Babacic, T:21344:8-21,21345:6; Sudac, T:21366:5-21367:24,21376:3-15; D-533; D-1602; D-1587, pg.8.

²³⁸ Perkovic, T:19449:3-10.

133. GOTOVINA's attack order also included a security plan that recognized that the MUP²³⁹ and the MP would be responsible for immediately controlling the liberated territory to prevent crime, such as burning and looting.²⁴⁰
134. Also on 2 August, JARNJAK and SUSAK met with LAUSIC and MORIC to establish the security plan during and after Operation Storm. After Operation Flash, TUDJMAN formed a coordination staff for Western Slavonia with LAUSIC responsible for the MPs, MORIC responsible for the MUP, and Ivan MAJDAK responsible "for dealing with the work and tasks which are the responsibility of the Government."²⁴¹ MORIC testified that at the 2 August meeting, the Ministers decided that "Mr. LAUSIC and I were supposed to be in charge of the whole matter at the operative level in such a way as to prevent such crimes committed and, if that should prove possible, to reduce them to a minimum."²⁴²
135. Following Operation Storm, the Croatian civilian authorities and civilian law enforcement forces were to be responsible for law and order in coordination with the MPs, and General CERMAK was appointed to the position held by Ivan MAJDAK following Operation Flash.²⁴³
136. On 3 August, MORIC, LAUSIC and SIS Chief of Administration GUGIC, among others, met to prepare the plans ordered by their respective Ministers. They discussed *inter alia* preventing problems experienced following Operation Flash, including "freelancers," non-participants in combat operations who appeared after the conclusion of the operation in HV uniforms and entered houses.²⁴⁴
137. Following the meeting, MORIC ordered various police administrations to organize their officers and to coordinate with the MPs.²⁴⁵

²³⁹ Ministry of the Interior.

²⁴⁰ **P-1126.**

²⁴¹ **D-1484.**

²⁴² **Moric,T:25818:4-13.**

²⁴³ **D-1471(Skare-Ozbolt),para.10; Skare-Ozbolt,T:18128:14-18129:15.**

²⁴⁴ **D-794.** GOTOVINA is not at this meeting.

²⁴⁵ **D-465; P-492; P-493; P-497.**

138. LAUSIC also issued orders regarding military police tasks during the upcoming operation.²⁴⁶ These orders related to cooperation between the MPs and MUP along with the treatment of POWs and civilians.²⁴⁷

iv. VONS Meeting on 3 August: Decision to launch Operation Storm

139. In Geneva on 3 August, Croatia gave the RSK an ultimatum: accept peaceful reintegration into Croatia²⁴⁸ under the same model of peaceful reintegration ultimately used in Eastern Slavonia.²⁴⁹ The Serb delegation refused.

140. That same day, GALBRAITH advised TUDJMAN about his alleged agreement with BABIC, aware that Croatia was rightly sceptical that BABIC could implement any agreement.²⁵⁰

141. The Croatian leadership did not believe BABIC had any authority to implement any agreement.²⁵¹ Accordingly, on the evening of 3 August at the National Security Council meeting (“VONS”),²⁵² the decision to launch Operation Storm was made. With only days until the VRS would launch their Vaganj counterattack, Croatia chose force to end the RSK occupation. Rather than suggesting expulsion, TUDJMAN told the VONS meeting attendees that he would tell the Serb people by radio to “lay down their weapons” and that Croatia would “vouch for their civil rights.”²⁵³

G. Conclusion of overview of the case

142. The factual context the Prosecution asserts in support of its JCE theory is contradicted by the evidence. The Trial Chamber cannot conclude that the “only reasonable explanation of the evidence” is that Croatia was pursuing a policy of expelling its Serb population by launching an unnecessary war and thus no adverse inference can be made as to the purpose or objective of Operation Storm and subsequent events.

²⁴⁶ **D-44; D-269.**

²⁴⁷ **P-493.**

²⁴⁸ **D-1471**(Skare-Ozbolt),para.4.

²⁴⁹ **D-1471**(Skare-Ozbolt),para.7; **D-1485**(Zuzul),para.19.

²⁵⁰ **Galbraith,T:5003:2-11.**

²⁵¹ **D-1471**(Skare-Ozbolt),para.5; **D-1485**(Zuzul),para.18.

²⁵² **D-1454; D-1485**(Zuzul),paras.20,23; **Galbraith,T:4922:19-25; Zuzul,T:18294:13-**

20,18304:25-18305:10; Skare-Ozbolt,T:18179:1-13.

²⁵³ **D-1454,pg.22.**

V. The Prosecution has failed to prove the existence of a JCE

A. Prosecution alleges a JCE formed at Brioni

143. The Prosecution theory incorporates GOTOVINA and virtually every member of the Croatian leadership, civilian and military, into a JCE, the common purpose of which was the “permanent removal of the Serb population from the “Krajina” by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropriation and destruction of property or other means.”²⁵⁴
144. The Prosecution alleges that the JCE came into existence during the Brioni Meeting, and that counts 1-5 were intended and were within the purpose of the joint criminal enterprise (“JCE I”).²⁵⁵ As to counts 6-9, the Prosecution alleges that these crimes were not within the purpose of the JCE but were the natural and foreseeable consequence of the JCE (“JCE III”).²⁵⁶
145. The Prosecution maintains that, as the “overall operational commander of Operation Storm,” GOTOVINA participated in a large-scale indiscriminate artillery attack intended to terrorize the Serbian civilian population to flee, and which resulted in their forcible displacement.²⁵⁷ In continuation of the same JCE, the Prosecution alleges that Operation Storm was followed by the large-scale destruction and appropriation of Serbian property, and other discriminatory measures designed to prevent the displaced population from returning.²⁵⁸
146. Finally, the Prosecution alleges that this common criminal purpose was implemented through (i) the shelling of civilian areas, (ii) Psy-Ops, (iii) persecutory killings, burning, looting, detentions and harassment, (iv) and obstacles to return.²⁵⁹

²⁵⁴ **JI**,para.12; **98bis**,T:17381:25-17382:3.

²⁵⁵ **98bis**,T:17431:8-13; **PTB**,para.16, **JI**,para.39.

²⁵⁶ **JI**,para.42; **PTB**,para.129.

²⁵⁷ **JI**,para.4.

²⁵⁸ **JI**,paras.4,18; **PTB**,para.128; **POS**,T:418:20-419:2; **98bis**,T:17431:1-17432:25.

²⁵⁹ **PTB**,pgs.10-15.

B. Burden of Proof: No reasonable explanation other than the guilt of the accused

147. To establish the existence of a JCE, the Prosecution must prove the following:

- a. plurality of persons;²⁶⁰
- b. existence of a common purpose that amounts to or involves the commission of a crime;²⁶¹ and
- c. participation of the Accused.²⁶²

To establish JCE liability, a crime must have been committed.²⁶³

148. JCE is not a theory based on guilt by association.²⁶⁴ No one may be held criminally responsible for acts or omissions in which he has not personally engaged or in some other way participated.²⁶⁵ The participation or contribution of an accused to the common criminal purpose “should at least be a significant contribution to the crimes for which the accused is found responsible.”²⁶⁶ Some cases require “a substantial contribution of the accused” and “[i]n practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose.”²⁶⁷

149. There is no direct evidence of a criminal plan to forcibly remove the Serb population from Croatia at Brioni, or any other time. There are only statements recognizing that departure of Serbs would be a collateral effect of the operation, but there is no statement at Brioni proving a common intention to commit crimes against Serb civilians or to compel their departure.

150. Although there is some discussion at Brioni regarding artillery and Psy-Ops, none of it relates to criminal conduct. There is no mention whatsoever of

²⁶⁰ *Tadic*, AJ, para.227; *Brdjanin*, AJ, para.364; *Stakic*, AJ, para.64; *Kvocka*, AJ, para.81; *Vasiljevic*, AJ, para.100.

²⁶¹ *Tadic*, AJ, para.227; *Brdjanin*, AJ, para.364; *Stakic*, AJ, para.64; *Kvocka*, AJ, para.81; *Vasiljevic*, AJ, para.100.

²⁶² *Limaj*, TJ, para.511; *Tadic*, AJ, para.229; *Brdjanin*, AJ, paras.364,427; *Stakic*, AJ, para.64; *Kvocka*, AJ, para.81.

²⁶³ *Brdjanin*, AJ, para.430.

²⁶⁴ *Prosecutor v. Sesay et al.*, SCSL-04-15-A, 26 October 2009, paras.285,313 (“*Sesay*, AJ”).

²⁶⁵ *Sesay*, AJ, paras.285,313; *Kvocka*, AJ, para.187; *Vasiljevic*, AJ, para.102; *Tadic*, AJ, para.229.

²⁶⁶ *Krajisnik*, AJ, para.215; *Brdjanin*, AJ, para.430.

²⁶⁷ *Kvocka*, AJ, para.97; *Popovic*, TJ, para.1027, fn.3379.

persecutory killings, burning, looting, detentions, harassment, or obstacles to return.

151. Having no direct evidence that a criminal plan to expel ethnic Serbs existed, the Prosecution can only invite the Trial Chamber to infer the existence of such a plan from circumstantial evidence. As previously stated, for the Trial Chamber to draw an inference of a common criminal plan, the Prosecution must demonstrate that this is the *only* reasonable inference available from the evidence.²⁶⁸
152. In the absence of direct evidence and where there are factual inconsistencies, the Trial Chamber cannot draw adverse inferences to establish a JCE.²⁶⁹ The *Blaskic* Appeals Chamber reversed the Trial Chamber's finding that *Blaskic* ordered an attack based on adverse inferences drawn from the absence of orders, number of admitted exhibits, and the manner in which the attacks and crimes were carried out.²⁷⁰ The Appeals Chamber found that "a brief examination of certain facts underlying these general assertions reveals certain inconsistencies" and therefore these assertions are "too broad and sweeping" to give rise to an adverse inference.²⁷¹
153. The Prosecution asks the Trial Chamber to ignore substantial evidence directly in conflict with its theory. In fact, the evidence supports alternate reasonable inferences consistent with the acquittal of GOTOVINA. As to the alleged methods of JCE implementation, each will be discussed in turn below.

C. There was no agreement at Brioni to forcibly remove the Serb population

154. When TUDJMAN met with top military officials at Brioni he expected negotiations with MARTIC to simply be a delay tactic, a sentiment shared by GALBRAITH, who remarked the same day that "[a]ny negotiations now would be a stall."²⁷² Knowing that the RSK would never agree to peaceful reintegration in Geneva, TUDJMAN advised that Croatia would "accept [these

²⁶⁸ *Martic*, AJ, paras.58,59.

²⁶⁹ *Blaskic*, AJ, paras.518,519,521-523.

²⁷⁰ *Blaskic*, AJ, paras.518,519,521-523.

²⁷¹ *Blaskic*, AJ, para.519.

²⁷² **P-458**,pg.20; **D-1471**(Skare-Ozbolt),para.4. Of course, this is exactly what the RSK attempted to do at the Geneva negotiations.

talks] as a mask” with the awareness that Croatia could not refuse to negotiate.²⁷³

155. Time was of the essence on several different levels. TUDJMAN recognized that if an offensive was launched both the RSK and the UN would attempt to create a stalemate to allow international intervention. Accordingly, he told the HV to complete the military operation in “three to four days, or a maximum of eight days, then we can count on the fact that we will not sustain any political damage.”²⁷⁴
156. Also with the impending VRS counteroffensive Vaganj looming,²⁷⁵ General CERVENKO warned GOTOVINA that “in a few days, very soon, he will be in a position of defending himself” from the Bosnian Serb counteroffensive.²⁷⁶ Accordingly, the Brioni Meeting participants urged that the Croatian offensive *must be completed* within eight days or else the VRS would have time to move forces to Grahovo.²⁷⁷ This assessment was remarkably accurate, as it took PANDUREVIC exactly ten days to position the VRS Drina Corps in the Grahovo area.²⁷⁸
157. The Brioni Meeting participants also knew that Serb soldiers and civilians were already fleeing Knin and the RSK,²⁷⁹ and would continue to do so “if we continue *this pressure*.”²⁸⁰ Contrary to the Prosecution’s contention, “*this pressure*” did not refer to artillery use²⁸¹ because there was yet to be any

²⁷³ P-461,pg.2.

²⁷⁴ P-461,pg.1.

²⁷⁵ P-461,pg.3.

²⁷⁶ P-461,pg.11.

²⁷⁷ P-461,pgs.3,19,28.

²⁷⁸ D-1978,pg.3.

²⁷⁹ With the fall of Grahovo, the RSK population realized that the HV would soon be in control of Knin. This caused Serbs to flee the “Krajina” in the days before Operation Storm. MRKSIC reported that 2000 conscripts fled after the fall of Grahovo as did civilians. D-923,pgs.16,20. On 29 July he ordered units to “take any measures in order to explain the situation in order to prevent the moving away of the population from the territory of the RSK,” and to court martial and execute deserters. D-1512; D-939. MRKSIC issued these orders because “the elite had started to flee.” Mrksic,T:18825:6-18826:1. This exodus was confirmed by local and international witnesses at the trial. See, e.g. [REDACTED] Grubor,T:1388:13-1389:3;1411:1-6; [REDACTED] D-513,pg.35; Gilbert,T:6420:2-13; Dangerfield,T:7136:4-7137:19; Berikoff,T:7909:9-7910:4; D-741,pg.4; D-820(Hendriks),pg.3.

²⁸⁰ P-461,pg.15(Emphasis added).

²⁸¹ PTB,para.16. At the 98bis proceedings, the Prosecution claimed that Rajcic said “*pressure* is a euphemism for artillery.” 98bis,T:17404:22-23. Rajcic said no such thing; he agreed in general that

artillery fire on Knin. Rather, “*this pressure*” referred to the threat of an HV attack, as reflected in a Croatian intelligence assessment on 30 July:

[The seizure of Grahovo] has created conditions to threaten Knin directly, which caused fear and panic among local Serbs. It is particularly pronounced *because they are afraid of an HV attack on the entire area of the RSK*. That is why more and more people are leaving Krajina and moving to RS and the SRJ /Federal Republic of Yugoslavia/.²⁸²

i. No discussion about directing artillery against civilians

158. At the core of the JCE allegation is the claim that TUDJMAN ordered the indiscriminate and excessive shelling of civilians to force them to flee.²⁸³ In fact, TUDJMAN urged his military commanders to do exactly the opposite. Speaking of Gracac, TUDJMAN told his commanders that “you have to enter as quickly as possible and report that you have entered...because that will have a psychological effect in such situations. *The psychological effect of the fall of a town is greater than if you shell it for two days.*”²⁸⁴ Concerned with shortfalls in ammunition, TUDJMAN warned against using artillery ammunition “as if we were Russians or Americans.”²⁸⁵ To TUDJMAN, it was clearly more important to take a town than to shell it.
159. The Prosecution implication that TUDJMAN improperly suggested that artillery should be used in Knin to achieve “complete demoralization” overlooks one of the fundamental purposes of artillery: demoralize the enemy and “break his morale.”²⁸⁶ TUDJMAN never suggested that civilians be targeted.
160. Furthermore, as a practical matter, the Brioni Meeting participants knew that there was no reason to target civilians to force them to flee. The departure of civilians was already ongoing and was rightly anticipated to continue as a result of the RSK leadership’s position that co-existence between Croats and

artillery can be used to put pressure on enemy forces, but he did not have any knowledge of the discussion at Brioni on this topic(Emphasis added).

²⁸² P-2619,pg.1(Emphasis added).

²⁸³ JI,paras.12,39; PTB,para.16; 98bis,T:17585:23-17586:20; POS,T:443:24-25.

²⁸⁴ P-461,pg.18(Emphasis added).

²⁸⁵ P-461,pg.21.

²⁸⁶ D-1247,pg.41;D-1254,pgs.3-4.

Serbs was impossible.²⁸⁷ DOMAZET reported that in the ARSK ranks “the first problem now is how to flee, and not how to fight.”²⁸⁸

161. TUDJMAN said that “when we *undertake a general offensive in the entire area*, even greater panic will break out in Knin than has to date.”²⁸⁹ The Prosecution acknowledges that TUDJMAN referred to the “general offensive” creating panic, and not shelling.²⁹⁰ GALBRAITH himself in June 1995²⁹¹ and on 2 August²⁹² stated that if Croatia were able to take Sectors North and South, “the Krajina Serbs would leave.” BABIC also understood that “Krajina” Serbs would leave if Croatia took back the occupied territory.²⁹³
162. To this end, TUDJMAN cautioned that DOMAZET’s proposed plan was “not providing them with an exit anywhere....[t]o pull out and flee; instead, you are forcing them to fight to the bitter end...when we *put pressure on them*, now they are already partly moving out of Knin. Accordingly, let us take into consideration, *on a military level*, the possibility of leaving them a way out somewhere, *so they can pull out part of their forces*.”²⁹⁴ TUDJMAN went on to state that “they should be given a way out here....Because it is important that those civilians set out, and then the army will follow them, and when the columns set out, they will have a psychological impact on each other.”²⁹⁵
163. Like GALBRAITH, TUDJMAN knew that when the Serbian JCE could not hold on to territory they evacuated: Bihac October 1994,²⁹⁶ Western Slavonia May 1995, and Grahovo July 1995. Croatia also knew about the RSK

²⁸⁷ Both Croatian and RSK intelligence confirmed the exodus. On 2 August, HV intelligence reported that “there was an outburst of panic in that area,” and that they had overheard an ARSK officer saying “the situation in Knin is the same as in Berlin in 1945.” **D-966**,pg.1. On 3 August, ARSK intelligence reported that elements of “panic” had been noted, and “[f]urthermore, the citizens believe that we are not able to defend ourselves and that, should there be no significant help by the FRY it would be better for the people to resettle to other areas rather than stay here to face encirclement and death.” **D-1495**,pg.4(Emphasis added).

²⁸⁸ **P-461**,pg.5.

²⁸⁹ **P-461**,pg.10(Emphasis added).

²⁹⁰ **PTB**,para.28.

²⁹¹ **P-458**,pg.8.

²⁹² **P-448**,pg.3.

²⁹³ **Galbraith**,T:4933:3-9.

²⁹⁴ **P-461**,pg.7(Emphasis added).

²⁹⁵ **P-461**,pg.15.

²⁹⁶ **D-252**.

preparations for civilian evacuation to RS.²⁹⁷ TUDJMAN never suggested that something be done to *cause* Serbs to leave; rather, *given that everyone knew the Serb leadership would withdraw the civilian population*, the HV should not do anything to force them to stay and fight, but rather allow them to leave.

164. In concert with TUDJMAN's statements, MRKSIC explained this basic tenet of warfare when the goal of the military operation is to take ground:

Whenever the purpose is not to destroy the enemy, to destroy his manpower, then you must always leave a road for the enemy to pull out. *However, if the goal is to conquer a territory, regardless of what happens to the enemy, then that escape route should be so wide that the enemy doesn't give it a second thought but use it. So you should never put the enemy in a situation where he has to fight instinctively and to fight to the death. That's the role of every commander.*²⁹⁸

165. Accordingly, there is nothing controversial about TUDJMAN's order that escape routes be left open. To the contrary, it was humane because it avoided a "bloody last stand."²⁹⁹ In fact, during Operation Storm both AKASHI and the Security Council insisted that Croatia allow Serbs to leave Croatia.³⁰⁰
166. As a result, the Prosecution is left clinging to a mischaracterization of a statement by TUDJMAN to imply that the plan was to forcibly remove the Serb civilians. Specifically, the Prosecution routinely quotes TUDJMAN as saying, "[w]e have to inflict such blows that the Serbs will to all practical purposes disappear."³⁰¹
167. A more complete contextual examination of what TUDJMAN said makes it clear that his reference to "Serbs" in that sentence refers to "Serbian forces," which he instructs his commanders to force to capitulate.³⁰²

²⁹⁷ D-441; P-2619(30 July HV Intel report discussing civilians leaving).

²⁹⁸ Mrksic,T:19139:8-19139:15(Emphasis added).

²⁹⁹ P-698,para.15.

³⁰⁰ D-1530,pg.3,para.2(a); D-28,para.3.

³⁰¹ PTB,para.16.

³⁰² "Therefore, we should leave the east totally alone, and resolve the question of the south and north. In which way do we resolve it? This is the subject of our discussion today. We have to inflict such blows that the Serbs will to all practical purposes disappear, that is to say, the areas we do not take at once must capitulate within a few days. ... Therefore our main task is not Bihac, but instead to inflict

ii. Brioni discussion about Psy-Ops

168. In addition to unlawful shelling, the Prosecution alleges that the expulsion of Serbs was to be achieved through the use of Psy-Ops.³⁰³ The Prosecution contends that the Brioni Meeting participants agreed to drop leaflets “to get the civilian population to flee.”³⁰⁴
169. There is no evidence that Brioni Meeting participants intended to target civilians with the use of leaflets. These leaflets were supposed to
- a. Be directed at Benkovac and Obrovac (both frontline towns);
 - b. Be in President TUDJMAN’s name;
 - c. Point out the routes to evacuate;
 - d. Refer to the victory of the HV;
 - e. Refer to Serbs already withdrawing; and
 - f. Appeal to Serbs not to withdraw because Croatia would guarantee civil rights.³⁰⁵
170. A plain reading of the Brioni meeting transcript demonstrates that the leaflets were intended to be used against ARSK combatants.³⁰⁶ In fact, the only leaflet admitted into evidence that resembled the one discussed at the Brioni meeting is directed to ARSK soldiers. It contains five of the six elements discussed at Brioni,³⁰⁷ but does not refer to specific routes for evacuation.³⁰⁸
171. In examining SUSAK’s comments at Brioni, it is clear that he properly advised using leaflets against ARSK soldiers to demonstrate battlefield dominance: “[u]se leaflets, but drop them among them. Instilling the feeling among them that you have succeeded, that you are above them, that you are dropping leaflets, this will provoke something.”³⁰⁹ This proposed use of

such /powerful/ blows in several directions that the Serbian forces will no longer be able to recover, but will have to capitulate.” P-461,pg.2.

³⁰³ **J1**,para.28; **PTB**,para.36.

³⁰⁴ **POS**,T:446:19-21; **98bis**,T:17384:14-18; **PTB**,para.36.

³⁰⁵ **P-461**,pg.29.

³⁰⁶ **D-1832**; **P-1113**,pgs.457-458.

³⁰⁷ **D-1832**; **P-1113**,pgs.457-458.

³⁰⁸ Although the leaflet is not literally in the name of TUDJMAN, it is clearly from the Croatian government.

³⁰⁹ **P-461**,pg.29.

leaflets as a part of Psy-Ops to show full spectrum operational dominance is an accepted part of military doctrine and does not impart any criminal motive to the military operation.³¹⁰ As for impact on civilians, there is no evidence that any leaflet was either received by or directed at any Serb civilian.

iii. No discussion at Brioni concerning burnings, lootings, killings, detentions or obstacles to return

172. The Prosecution concedes that there is no reference in the Brioni transcript to the use of burning and looting as a means of forcibly removing Serbs or keeping them out.³¹¹ Nevertheless, the Prosecution claimed for the first time at the Rule 98 *bis* hearing that “burning and looting” can be inferred to be part of the JCE on the basis of the following inaccurate observations: (1) GOTOVINA’s forces were burning down Grahovo “in an organised fashion” the day before the Brioni Meeting, and (2) during the Brioni Meeting, GOTOVINA informed TUDJMAN that he was going to bring the same troops to Knin “who were hard to keep on a leash.”³¹²
173. Unlike the statements that the Prosecution attempts to falsely portray as an agreement to expel all Serbs, there is simply no statement at Brioni that suggests an additional agreement to commit persecutory acts such as plunder and destruction of property, or murder of civilians. The Prosecution has only alleged a JCE at Brioni. While it is not necessary to demonstrate *explicit* agreement on the common purpose and that it may arise extemporaneously,³¹³ the Prosecution must still identify the specific crimes within the scope of the common objective as well as how and when it was formed.³¹⁴ They have not done so. Likewise, even though crimes may be “added” to the original common purpose at a later date, the evidence must clearly show that such crimes were deliberately incorporated at a specific time and were not merely part of a “fluid” JCE.³¹⁵ Fundamentally, the Prosecution has not alleged any agreement other than Brioni and an examination of the evidence does not

³¹⁰ D-1254,pg.2; Corn,T:21193:2-18.

³¹¹ 98*bis*,T:17385:13-25.

³¹² 98*bis*,T:17385:13-25.

³¹³ *Krajisnik*,AJ,para.163;*Furundzija*,AJ,para.119.

³¹⁴ *Krajisnik*,AJ,paras.175-176;*Brdjanin*,AJ,paras.410,430.

³¹⁵ *Krajisnik*,AJ,paras.171,175-176.

allow for an inference that there was any other agreement amounting to a JCE to commit persecutory crimes.³¹⁶

174. The Prosecution offered no evidence that burning in Grahovo was done in an “organised fashion.” To the contrary, the evidence of burning in Grahovo quite clearly demonstrated that the burning was undesired and not tolerated.³¹⁷
175. Furthermore, GOTOVINA had taken necessary measures to address these problems and prevent undisciplined behaviour in his operational orders and by *inter alia* replacing the commander of the operative group in command of the 4th Guards Brigade and 7th Guards Brigade (“GBr”) on the eve of Operation Storm.³¹⁸
176. As for the “leash” argument, the Prosecution wrongly claims that at Brioni GOTOVINA stated that his troops could not be “kept on a leash,” and that this implied that they were undisciplined. Once again, the Prosecution’s interpretation of GOTOVINA’s words is false because they fail to examine what exactly was said and in what context. GOTOVINA was referring specifically to the 3rd Battalion of the 126th Regiment, not to all of his forces,³¹⁹ and was referring to their morale and their desire to fight, not to any lack of discipline. This is evident on the video of the 6 August meeting in Knin, where GOTOVINA stated as follows:

What’s wrong with you, commanders?! You don’t feel like waging war any more! And you were whining there three months ago, that you needed be kept on a leash so you wouldn’t launch something yourselves! And now that you’ve got going, what’s wrong with you now? Are you tired all of a sudden?³²⁰

177. As far as the comment referring to a lack of discipline, there is no evidence that the 3rd Battalion of the 126th Regiment participated in the Grahovo operation or committed any crime during or after Operation Storm.

³¹⁶ *Halilovic*,AJ,para.198: “[A] trier of fact is necessarily bound by the theories advanced by the Prosecution.”

³¹⁷ *Theunens*,T:12737:3-12738:3; *P-71*,pg.73; *D-1979*.

³¹⁸ *D-793*. Significantly, the commander of the 4GBr issued an order on 30 July strictly forbidding burning in Grahovo and ordering disciplinary measures and criminal prosecutions for any person found to have done so. *P-1113*,pg.321.

³¹⁹ *P-461*,pg.10.

³²⁰ *D-979*,pg.6(Emphasis added).

GOTOVINA's use of the 3rd Battalion of the 126th Regiment is a non-issue, as is his reference at Brioni to keeping them "on a leash." Accordingly, the Prosecution's claim that a burning and looting JCE can be inferred from GOTOVINA's reference to a "leash" at Brioni stretches credulity.

178. As more fully discussed herein, with respect to each alleged method of implementing this supposed JCE, the actions taken by Croatia both before and after the Brioni Meeting expose the falsity of the Prosecutions position.³²¹
179. Finally, since the Prosecution does not allege that obstacles to return were discussed at Brioni, it is impossible to ascertain how this issue was part of the JCE. Nevertheless, matters related to the Prosecution's positions regarding alleged "obstacles" to return are discussed in Section V.D.v.

D. The Prosecution has failed to establish beyond reasonable doubt that Gotovina used any illegal means in executing Operation Storm

i. The lawful employment of artillery

1. Gotovina's artillery order was not illegal

180. The Prosecution contends that the only reasonable interpretation of GOTOVINA's operational attack order is that it was an illegal order to attack civilians. At the Rule 98 *bis* hearing, the Prosecution stated that, "General Gotovina's order to put the civilian-populated towns under artillery fire is a patently illegal order as it explicitly directs his subordinates to disregard the principles of proportionality and distinction and to make entire towns targets for artillery fire."³²²
181. The Prosecution's conclusion is based on only a portion of a sentence within the order ("put the towns of Drvar, Knin, Benkovac, Obrovac and Gracac under artillery fire *ludare*").³²³ The Prosecution ignores that GOTOVINA's subordinates understood the order to mean that precise artillery strikes were to be launched against military objectives, pursuant to specific x-y-z

³²¹ See also Section V.D.

³²² **98bis**, T:17405:25-17406:4; **P-1259**, pg.8("[c]ivilian populated areas can never be designated as a military target."); **P-1259**, pg.17("This means that the civilian population is targeted to force military units to retreat or even to surrender.").

³²³ **D-970**.

coordinates.³²⁴ This is evident from the subsequent orders passed on by the subordinates.³²⁵ This fact alone establishes a reasonable explanation of the artillery attack order other than the guilt of the Accused.

182. Furthermore, not only does the Prosecution ignore the remainder of the relevant sentence in the order, but also the other expressions of the commander's intent within the order. In fact, the very sentence at issue directs the artillery support to "focus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy's front line, command posts, communications centres, [and] artillery firing positions."³²⁶
183. Additionally, an earlier portion of the operational order instructs the artillery to be "directed at the main military and political transportation features in the enemy's operational depth," an expression of commander's intent entirely consistent with the laws of armed conflict and, more specifically, the manoeuvrist approach to warfare.³²⁷
184. Thus, a reasonable conclusion is that the operational order is legal and directs the artillery support to engage the main military objectives on the front line as well as in the specified cities within the ARSK's operational depth.
185. This alternative conclusion is supported by the HV Main Staff directive issued prior to Operation Storm, which directed the Split MD to do the following:

neutraliz[e] GS VRS/Republika Srpska Army Main Staff and the 7th Corps Command Post in Knin, the brigades' command posts, concentrations of enemy manpower, armor, and artillery in the area of Knin and Benkovac, including ammunition and fuel depots, while

³²⁴ **D-1425**(Rajcic),para.29.

³²⁵ **P-1272**(See reference to "udare" in BCS along left-hand column).

³²⁶ **D-970**.

³²⁷ KONINGS conceded that "[t]he initial tasks given in the operational orders to artillery units seem to be regular artillery tasks in coordination with the appropriate tactical commanders in order to support the offensive activities of the Croatian Army. These artillery tasks do not differ from all the information given in this expert report and can be judged to have military assets as the targets. The overall effect that should be achieved is the support of an offensive operation. This overall effect will give artillery commanders already a good idea which tasks their units will have to execute." **P-1259**,pg.17. See also Section V.D.i.3(a).

supporting the main forces in attack and preventing an enemy counter-attack from the direction of Knin, Kastel Zegarski and Benkovac.³²⁸

186. Further, GOTOVINA's subordinates interpreted the operational order consistent with this conclusion. RAJCIC followed GOTOVINA's intent in preparing the artillery attachment to the operational order and ordered the artillery support to "put the towns of Drvar, Knin Benkovac, Obrovac and Gracac under artillery fire */udare/*."³²⁹ RAJCIC's use of "*udare*" indicated that specific military objectives were to be engaged during the artillery preparation phase in a pre-planned, coordinated sequence of grouped artillery strikes.³³⁰
187. Finally, the artillery order puts the Bosnian town of Drvar under "artillery fire */udare/*" as well. If the artillery order was intended to further the alleged Brioni common criminal purpose of expelling the "Krajina" Serbs,³³¹ the Prosecution has failed to explain why the Bosnian town of Drvar was included. A reasonable interpretation is that GOTOVINA's order was not intended to shell towns indiscriminately, but rather to place precise strikes against ARSK military objectives in "Krajina" and VRS military objectives in the RS.
188. It is clear that GOTOVINA's operational order expressed the intent to place precise artillery strikes on specific military objectives, and most importantly, this was how it was interpreted by his subordinates. Accordingly, the Prosecution's position that this was an illegal order does not withstand scrutiny.

2. The Prosecution has failed to prove that the plans for use of artillery changed as a result of the Brioni meeting

189. The Prosecution erroneously claims that "the Brioni meeting changed the plan for artillery use into a means of forcibly expelling the Serb civilian population."³³² On the contrary, the operational planning had begun long

³²⁸ D-956,pg.6.

³²⁹ D-970,pg.3.

³³⁰ P-1272(Note that each "strike/*vatreni udar*" consists of a group of military objectives to be engaged simultaneously for specified periods of time.).

³³¹ 98bis,T:17580:6-13.

³³² 98bis,T:17580:11-13.

before the Brioni Meeting and there were no changes made thereafter to corroborate the Prosecution's theory.

(a) Military planning began in 1992

190. The planning for the military option to reintegrate the "Krajina" began in 1992, shortly after the cessation of combat activities and the separation of forces.³³³ Indeed, the planning had been generally completed well prior to the Brioni Meeting, a date central to the Prosecution's theory of liability.³³⁴
191. The military planning was conducted both at the HV Main Staff level as well as at the lower Military District ("MD") levels, including at the level of the Split MD, where the planning consisted in part of training exercises and war games for various operations groups.³³⁵ The training also included specific courses for approximately 750 HV personnel assigned to artillery units responsible for the planning and using of artillery in support of military operations.³³⁶ The lengthy planning involved in the area of artillery deployment is instructive given the allegations.
192. Static defence lines provided the opportunity to establish twenty-two (22) artillery observation posts from the Velebit to the Dinara Mountains which, along with Croatian intelligence services, were constantly involved in gathering information on ARSK military dispositions, assets, capabilities, and vulnerabilities to assist in the identification of potential ARSK military objectives suitable for engagement by HV indirect fire.³³⁷
193. The Split MD commands and units prepared lists of military objectives throughout the RSK, including within Knin, Benkovac, Obrovac and Gracac, with HV commanders and their staffs constantly updating and revising these lists based on new information and intelligence analysis.³³⁸

³³³ **Rajcic, T:**16522:11-16523:18;16262:4-18;16525:20-24; **D-1425**(Rajcic),paras.49-50.

³³⁴ **Jl,**para.39; **PTB,**para.16.

³³⁵ **Rajcic, T:**16424:23-25; **D-1425**(Rajcic),para.50.

³³⁶ **D-1425**(Rajcic),paras.50-55.

³³⁷ **D-1425**(Rajcic),paras.25-26.

³³⁸ **Rajcic, T:**16452:7-21;16453:1-11;16254:9-20;17666:7-11,20-23; **D-1425**(Rajcic),para.43.

194. These military objectives included targets at all major command levels and were registered, maintained, and updated within a computer database by the HV intelligence department, which employed an all source intelligence collection and analysis process to discover, monitor, and assess these objectives. Assets employed in this collection and analysis process included unmanned aerial drones, human intelligence, and electronic surveillance.³³⁹ The database, which was accessible to appropriate HV members, contained the x-y-z coordinates for each military objective.³⁴⁰
195. The HV then used the database to develop and update artillery plans prior to military operations or training exercises. The database was also available to create various supporting artillery plans and documents, such as target lists, to support pre-planned fire support missions or to quickly respond to tactical developments during the battle. These documents were developed to maximize the effects of fire support on high value and high payoff military objectives during what the HV anticipated would be a rapidly evolving operational environment once the ground tactical battle commenced.³⁴¹
196. This intelligence driven planning for fire support employment is consistent with military doctrine and essential for achieving maximum military advantage from fire support assets to *inter alia* facilitate rapid responsiveness to fire support requests from maneuvering units engaged in close combat.³⁴² These efforts reflect a deliberate process of identifying high value and high payoff targets to maximize the effects of indirect fire assets during future offensive operations.
197. In light of the foregoing, the Prosecution's implausible argument that Brioni changed how artillery was to be deployed has no support in the record and demonstrates a serious lack of appreciation of the time needed to plan and deploy direct and indirect fire assets on the battlefield.

³³⁹ D-967; D-962; D-968; D-963; D-1425(Rajcic),paras.23-24.

³⁴⁰ D-1447; D-1459; Rajcic,T:16328:19-16329:8.

³⁴¹ Rajcic,T:17638:10-12; D-1425(Rajcic),para.21.

³⁴² Rajcic,T:17640:2-12;17648:22-17649:2.

(b) HV Main Staff Directive: Issued in late June

198. Operation Storm was the planned offensive to defeat the ARSK in UN Sectors North and South. It was divided by the HV Main Staff into four portions and GOTOVINA was given operational command to execute the main effort along the most critical axis of attack, a portion known as Storm-4.³⁴³
199. As an operational commander GOTOVINA's planning was governed by the HV Main Staff Directives issued on 26 June 1995. This Directive included, *inter alia*, operational guidance for the use of artillery fire support.³⁴⁴
200. Consistent with accepted military doctrine in its Directive, the HV Main Staff contemplated that the military operation would include employment of artillery and rocket assets against command, control, communication, intelligence ("C3I") and logistics targets in and around Knin, which had been identified as the enemy center of gravity ("COG")³⁴⁵ and Benkovac.³⁴⁶
201. Initially, the HV Main Staff allocated six (6) combat loads to artillery groups for the entire operation in GOTOVINA's area of operation.³⁴⁷ As discussed further below, this was ultimately reduced to four (4) due to ammunition supply concerns and the inability to sustain a resupply rate necessary to support the artillery use originally anticipated. Thus, on the eve of Operation Storm, the artillery resources available to GOTOVINA were reduced substantially to conserve the limited ammunition available.³⁴⁸ GOTOVINA adjusted his planning accordingly.

³⁴³ **D-956**(26 June Main Staff Directive); **D-957**(26 June Order for Storm to GOTOVINA); **D-958**(27 June Attachments to Order for Split MD). Also, note that in his later operational orders, GOTOVINA ultimately labeled this operation by the code-name Kozjak-95; **P-1125**(2 August Kozjak Order).

³⁴⁴ **D-956; D-957; D-958.**

³⁴⁵ The COG is defined in NATO as the "[c]haracteristics, capabilities or localities from which a nation, an alliance, a military force or other grouping derives its freedom of action, physical strength or will to fight." **D-117**,pg.2; **D-1247**,pgs.47-49.

³⁴⁶ **D-956.** In the Directive, the chief role of artillery was to protect flanks on the main attack axes and prevent enemy reinforcements. The main attack axes in southern part of Sector South were axes Dinara-Knin(MD Split) and Velebit-Gracac(MUP SJP). That was a classical pincer manoeuvre to encircle ARSK 7 Corp, since liberation of mentioned towns opened opportunity for linkage of forces in the area of Otric village.

³⁴⁷ **D-956.**

³⁴⁸ **Rajcic,T:16621:2-11; P-1125.**

(c) HV artillery limitations for Operation Storm

202. Since Operation Winter 94, Knin had been in range of HV long range artillery assets.³⁴⁹ After taking Grahovo, additional HV artillery assets near the Grahovo-area front line were ideally placed to engage objectives in Knin.³⁵⁰ These positions, despite being fully capable operationally, never engaged any target in Knin prior to 4 August.³⁵¹
203. For Operation Storm, the Split MD's 250 kilometer long confrontation line in Croatia and Bosnia was covered by five artillery groups. With limited assets, each artillery group consisted of mixed ranges of weaponry tasked to provide artillery support for the operational needs of the Split MD Command as well as the tactical needs of the OG Commands.³⁵²
204. With respect to each artillery group, given that the HV faced a significant ammunition shortage and resupply constraints, GOTOVINA stressed the importance of fire discipline and conservation of artillery ammunition.³⁵³

(d) Final planning for Operation Storm: 31 July - 3 August 1995

(i) 31 July

205. On the evening of 31 July, GOTOVINA tasked RAJCIC, his chief of artillery, to prepare artillery fire support plans for the next phase of the military campaign,³⁵⁴ and in doing so, RAJCIC began the target selection process.
206. Traditionally, the target selection process begins with the military mission. Then military planners determine the military objectives to be engaged, as well as the best assets to be employed to accomplish the mission.³⁵⁵

³⁴⁹ **Rajcic, T:16560:14-17; D-971; D-1425(Rajcic), paras.2-3.**

³⁵⁰ **D-1425(Rajcic), para.2.**

³⁵¹ **D-971; Rajcic, T:16280:20-16281:4.**

³⁵² **D-1425(Rajcic), paras.34-40.**

³⁵³ **D-1425(Rajcic), paras.10,62("we were faced with significant limitations with respect to the amount of available ammunition and artillery assets."); Rajcic, T:16622:5-15(planning for Operation Storm called for more artillery than was available).**

³⁵⁴ **Rajcic, T:16526:3-5; D-1425(Rajcic) para.1(Rajcic was the Chief of Artillery in the Split MD from 1 April 1993 until 17 June 1996).**

³⁵⁵ **D-1642, pg.8. See Section V.D.i.4(a).**

207. Although there is no definitive list, Article 52 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 (“AP I”) indicates that “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage.”³⁵⁶
208. After following standard target selection procedure and identifying potential military objectives to be engaged – a process involving consideration of the mission he was tasked to support, intelligence related to enemy dispositions, capabilities, and vulnerabilities, and the capacity of his assets to produce desired effects - RAJCIC prepared an artillery map with a tabular-textual part for the artillery attachment to the operational order for attack.³⁵⁷
209. Weaponeering decisions were also made. With respect to the military objectives in the enemy support area (the area removed from the immediate enemy defensive lines), such as those in Knin, the HV selected the artillery assets capable of being directed at and hitting military objectives, based on the relationship between the desired tactical effect and the capability of each respective weapon system.³⁵⁸ Specifically, fire missions were assigned to T-130mm guns and MRLS 122mm BM21 rocket launchers, with standard contact fuse explosives employed as ammunition.³⁵⁹

(ii) 1 August

210. On 1 August, representatives of the Split MD, OG North, OG Sibenik, OG Sinj, and OG Zadar attended a planning meeting in Split,³⁶⁰ where GOTOVINA reiterated his intent for the operational plan.³⁶¹ Consistent with the established Croatian strategic goals, GOTOVINA emphasized that the mission was to achieve a military victory against ARSK forces by defeating them in depth, that the operation was aimed against enemy soldiers, that

³⁵⁶ D-1642, pgs.8-9. See Section V.D.i.4(a).

³⁵⁷ D-1425(Rajcic), para.5.

³⁵⁸ Konings, T:14758:11-15; Corn, T:21501:14-20; D-1425(Rajcic), para.16.

³⁵⁹ D-1425(Rajcic), paras.64-65.

³⁶⁰ D-1425(Rajcic), para.6.

³⁶¹ Rajcic, T:16266:4-18; 16276:17-16277:1.

civilians and prisoners of war must receive proper treatment and protection, and that the UNCRO facilities must not be put in danger.³⁶²

211. Consistent with TUDJMAN's Brioni admonition regarding the shortage of artillery ammunition, GOTOVINA emphasized that the use of artillery be judicious, and targeted against the military objectives that provided the highest tactical and operational payoff (military advantage).³⁶³
212. The meeting attendees also discussed details of the potential artillery targets, including the x-y-z coordinates of each.³⁶⁴ Many of the military objectives ultimately selected were well known to the HV and in locations for which the HV had maintained coordinates for a significant period of time.³⁶⁵
213. This target selection process was standard practice in the Split MD, and was consistent with general military targeting principles where all commanding levels prepare their own plans.³⁶⁶ Moreover, as RAJCIC testified, "throughout the duration of the homeland war, I never fired a single projectile without knowing the exact coordinates, nor did the units I was in command of, ever."³⁶⁷
214. GOTOVINA and his subordinate commanders were aware that the ARSK throughout the RSK had extensively co-mingled military objectives with civilian property and civilians. Accordingly, he understood that engaging these lawful military objectives could result in civilian deaths and damage to civilian structures.³⁶⁸
215. However, with respect to the civilian population in Knin prior to Operation Storm, as noted previously, HV intelligence had assessed that there had been a

³⁶² **Rajcic**,T:16278:11-16279:2; **D-1425**(Rajcic),paras.7,9,17,30.

³⁶³ **D-1425**(Rajcic),para.10.

³⁶⁴ **Rajcic**,T:16537:1-4;17641:17-22("[w]e select targets for the purposes of artillery and rocket groups from a database such as this one ...we selected such high value targets for all artillery rocket groups. In other words, a type of target, a location of target, x-y-z and dimension of target if known."); 16453:12-20(target selection for Benkovac, Obrovac and Gracac also done on 1-2 August 1995).

³⁶⁵ **Rajcic**,T:16524:8-16525:2.

³⁶⁶ **P-1259**,pgs.6-7; **D-1447**; **D-1459**.

³⁶⁷ **Rajcic**,T:17718:18-23.

³⁶⁸ **D-1425**(Rajcic),paras.17,19,31.

substantial emigration following the prior HV military successes³⁶⁹ and the ARSK had mobilized all males between the ages of eighteen (18) and sixty (60).³⁷⁰

216. On the eve of Operation Storm, the HV calculated that as a result of the previous expulsion of non-Serb inhabitants, the ongoing emigration of Serb civilians, and the ARSK mobilization, civilians in the six square kilometer settlement of Knin was numbered between 2,000 and 3,000.³⁷¹
217. For the remaining civilians, the RSK declared a state of war on 29 July and broadcast via television and radio that a civilian curfew was in effect.³⁷²
218. As a result, HV commanders reasonably assumed, that there would be fewer people on the street early in the morning hours³⁷³ and anticipated that the remaining civilians would “go to ground” and remain in shelters as the artillery preparation began at 05.00 hrs on 4 August.³⁷⁴
219. Ultimately, based on the assessed importance and nature of the military objectives, and the effects to be achieved as well as the intelligence related to the emigration of civilians from Knin and the curfew, GOTOVINA determined that the anticipated risk of incidental injury to civilians and civilian property would not be excessive in relation to the critical military

³⁶⁹ P-2619(30 July HV Intelligence report discussing civilians leaving); D-966,pg.1; Rajcic,T:16286:8-12;16458:6-10(“I think that Gotovina had information, even before the start of Operation Storm, that the civilian population was moving out of Knin.”);16602:17-19; D-923,pg.16(Mrksic report states that at least 2000 conscripts left RSK after Grahovo fell.); D-1512(Mrksic Order of 29 July which he issues “because of panic among individuals” orders that families of soldiers are to be prevented from leaving the Krajina, and to “take measures to prevent the moving away of the population from the Krajina.”).

³⁷⁰ P-2619; [REDACTED] Rajcic,T:16480:18-16481:2; P-744; D-1217(Boucher),para.20; D-101.

³⁷¹ Rajcic,T:16483:5-16484:7(“...[b]ased on all that, I conclude that there was a small number of civilians in that six square kilometers (sic) area.”).

³⁷² P-2619; D-241; Rajcic,T:16286:6-7; [REDACTED] D-119; [REDACTED] Al-

Alfi,T:13879:14-13881:6.

³⁷³ Konings,T:14699:4-15; Al-Alfi,T:13879:14-13881:6.

³⁷⁴ D-1642,pg.28; P-2619(30 July HV Intelligence report discussing civilians preparing shelters).

advantage to be achieved by attacking these co-mingled targets. In doing so, he effectively applied the principle of proportionality.³⁷⁵

220. Following the planning meetings, RAJCIC employed standard procedure in preparing supporting documents for a military operation and reviewing the source lists of potential military objectives. After weighing the effects his assets could produce, and the military advantage to be achieved against the possible collateral damage and civilian casualties, RAJCIC selected the final military targets needed to execute GOTOVINA's intent. The selected targets were then incorporated into final operational documents for use by various artillery units. Those documents included tabular-textual lists with coordinates for the military objectives to be engaged with artillery.³⁷⁶

(iii) 2 August

221. On 2 August, GOTOVINA's Kozjak-95 operational order was completed and sent to subordinate commanders.³⁷⁷ Included within the order was GOTOVINA's stated intent for the use of artillery support, drafted by RAJCIC.³⁷⁸ An Attack Order for Artillery was attached thereto, also drafted by RAJCIC.³⁷⁹ Additionally, as the operational order moved down the chain of command, every chief of artillery in the subordinate brigades prepared or updated their artillery plans and maintained the necessary field maps to ensure consistency with the superior command plan and the brigade commander's intent.³⁸⁰
222. The plan called for a simultaneous attack against military objectives at the enemy defence's front line and a supporting attack against ARSK military

³⁷⁵ **Rajcic**, T:16277:19-16278:2;16278:11-16279:2;16284:24-16285:16;16451:20-25("We took into consideration ...the rule of proportionality. In Croatian we say 'uravno tejo nostvo' [phoen], balancing out, because it is a non-disputable fact that in such a context civilians can also be found.").

³⁷⁶ **Rajcic**, T:16552:15-22;16329:21-23;16330:2-8;16430:17-16431:1("The targets contained in that particular table and the targets that came out of the selection process in the staff were the constituent part of the database of all the targets."); **D-1425**(Rajcic), paras.18-19.

³⁷⁷ **P-1125**.

³⁷⁸ **P-1125**; pg.14; **Rajcic**, T:16529:14-16530:6.

³⁷⁹ **P-1205**; **D-1425**(Rajcic), paras.44-47.

³⁸⁰ **D-1426**(Order of the 112th Brigade in Zadar: tasks are to fire on a tactical level only in support of infantry troops fighting ARSK and makes no mention of firing at targets in depth in Knin, Benkovac, Gracac, Obrovac or Drvar).

- objectives in the tactical and operational depth.³⁸¹ Synchronization of fire and surprise were important elements.³⁸²
223. Consistent with the manoeuvrist approach,³⁸³ the goal was to create a shock effect on the ARSK C3I system while simultaneously attacking the front line positions.³⁸⁴ The artillery use against military objectives in depth, such as those within Knin, Benkovac, Obrovac, Gracac and Drvar, was coordinated with offensive manoeuvre forces to support their advance.³⁸⁵ It was designed to disorient and disrupt the ARSK leadership, isolating them from the front line and potentially creating a domino effect where the defence lines would break and the ARSK would capitulate.³⁸⁶
224. To assist in the supervision and coordination of his forces, GOTOVINA established two FCPs: FCP Sajkovic, which commanded the overall operation and supervised subordinate OG North and OG Sinj tactical operations, and FCP Zadar, which coordinated subordinated OG Zadar and OG Sibenik tactical operations.
225. To strengthen the command and control, he appointed Split MD Chief of Staff ADEMI³⁸⁷ to command OG North and kept OG North command merged and co-located with FCP Sajkovic. Similarly, to ensure complex coordination over artillery support, he also posted RAJCIC in FCP Sajkovic, while his Chief of Intelligence BONACIN was posted at FCP Zadar to command on behalf of the Split MD commander.³⁸⁸
226. Also on 2 August, GOTOVINA attended a meeting at 10.00 hrs at the Ministry of Defense in Zagreb with SUSAK and other operational

³⁸¹ **Corn,T:21310:2-10.**

³⁸² **D-1425(Rajcic),para.12.**

³⁸³ **P-1125,pg.6; Corn,T:21256:20-21259:8;21263:22-21264:10;21265:12-21266:10;21275:1-23.**

See Section V.D.i.3(a).

³⁸⁴ **D-1425(Rajcic),para.12.**

³⁸⁵ **D-1425(Rajcic),para.4; D-1260.**

³⁸⁶ **D-1425(Rajcic),para.12.**

³⁸⁷ During the duration of Operation Storm, Ademi was the commander of OG North. *See P-1125* Kozjak OpOrd, part OG North, and **D-793** Ademi appointment order.

³⁸⁸ **D-71,pg.75.**

commanders to discuss the combat plans in their respective areas of operation.³⁸⁹

227. Later that day, other Croatian government officials met to discuss plans for reestablishing law and order in the liberated terrain immediately following the military liberation.³⁹⁰ Similar to the offensive operation, this post-combat phase required planning at the operational level.³⁹¹ As discussed in Section V.D.iv.5(a) herein, GOTOVINA was not involved in this post-operation planning.

(iv) 3 August

228. On 3 August, GOTOVINA held several meetings to prepare for military action. In one meeting attended with MARKAC and RAJCIC, GOTOVINA implemented an HV Main Staff instruction and ordered RAJCIC to detach and reassign a portion of Artillery Group TRS-5 to MUP Special Police along their axis of attack.³⁹²
229. To ensure that the artillery assets would achieve maximum effect in the most efficient manner, RAJCIC also “spent 3 August 1995 visiting with the Chiefs of Artillery at the various Operational Groups, and the Command of each artillery group to coordinate and harmonize planned artillery targets for the operation, and to check whether everyone understood their tasks and that they had a reliable communications system and other details.”³⁹³
230. Later that day, RAJCIC met with the Chiefs of Artillery of the 4GBr and 7GBr in FCP Sajkovic to coordinate artillery support along the main axis of attack.³⁹⁴
231. During the night of 3 August, the transfer of the Split MD FCP and OG North FCP from Rujani to Sajkovic was completed.³⁹⁵

³⁸⁹ D-409.
³⁹⁰ D-409.
³⁹¹ D-1624,para.53.
³⁹² D-1425(Rajcic),para.57.
³⁹³ D-1425(Rajcic),para.58.
³⁹⁴ D-1425(Rajcic),para.59.
³⁹⁵ D-1425(Rajcic),para.59.

232. In light of all of the foregoing plans prior to the Brioni Meeting, as well as the effort needed to successfully deploy military assets for combat, for the Prosecution to argue that all of these labours only came into effect after Brioni significantly underestimates the planning and preparation needed to deploy forces in the field in a synchronized attack at both the point of contact and in depth. Essentially, the Prosecution's argument that the use of artillery changed after the Brioni Meeting is baseless and fundamentally demonstrates an inexperienced approach to the realities of land warfare.

3. The Prosecution erroneously asserts that there were no legitimate military objectives in Knin and other towns

233. The Prosecution claims that the HV unlawfully shelled Knin and other towns because there allegedly is "no evidence to indicate that the ARSK had planned to defend Knin from within," *i.e.*, "there was no military defence of Knin itself, meaning no combat troops, no defence trenches, no anti-tank ditches, no heavy weapon deployments, and no outgoing fire from within the town."³⁹⁶

234. Quite simply, the Prosecution's argument fails to take into account widely accepted military doctrine. The overall concept of Operation Storm, including the use of indirect artillery fires, was consistent with legally legitimate and tactically sound operational art, and was tactically responsive to the operational situation facing GOTOVINA. The Prosecution is simply wrong when it claims that the only legitimate military objectives within a town are "combat troops, defence trenches and heavy weapons positions."

(a) The manoeuvrist approach and Operation Storm: Overview of military doctrine

235. The nescient view of the Prosecution purposefully ignores widely accepted military doctrine underpinning the design of Operation Storm which directly contradicts the Prosecution's argument that artillery was used in an improper manner.³⁹⁷

³⁹⁶ **98bis**,T:17394:4-8.

³⁹⁷ The Prosecutor claims that the Operational Order, **P-1125**, includes an illicit order from GOTOVINA to attack civilians in Knin and other cities with artillery. This interpretation requires ignoring generally accepted military doctrine discussed herein, the context of the existing planning for artillery use within which the order was drafted which reflects operational synchronization of those

236. To fully understand the HV's employment of artillery assets, a brief discussion of military principles of artillery use is necessary. In fact, when viewed through the paradigm of these widely accepted operational principles, the concept and execution of combat operations based on GOTOVINA's operational order developed and implemented by his staff and subordinate commanders, were not only operationally sound but also effective.
237. Operation Storm is an example of the military principle that the decisive element of an operation involves attacking the will and cohesion of the adversary, which means the battle is not typically won destroying the adversary's personnel and material, but rather by disabling the enemy's ability to sustain effective resistance.³⁹⁸
238. Manoeuvre, firepower, tempo, simultaneity, and information operations are important means to undermine the desire and ability of enemy forces to fight.³⁹⁹ Offensive firepower in depth, such as artillery, is effective to disrupt enemy C3I functions, fix enemy forces in place, protect friendly forces from enemy fire support, and undermine the desire and ability of enemy forces to fight.⁴⁰⁰
239. Artillery also demonstrates an attacker's strength and capabilities. Combined with information operations, such as Psy-Ops, an impression of full spectrum operational dominance⁴⁰¹ by attacking forces is created before it is achieved. On the individual or small unit level, emotions such as fear, panic, shock, and

assets with the broader tactical effort, and the surrounding language within the very order itself. Further, the Prosecutor's interpretation begs the question: if the intent was to make the civilians the object of the attack why was that not more explicitly stated or reflected in the effects produced by the employment of indirect fires in the vicinity of Knin? *Corn, T:21268:15-17*. Moreover, from a military standpoint it would be counterproductive for the HV to target civilians or purely civilian structures. **D-1578**(Herrick), para.23("if the HV targeted civilian objects such as schools, hospitals, etc. it would anger the population and make them want to stand and fight.").

³⁹⁸ **D-1247**, pg.41; **D-1254**, pgs.3-5.

³⁹⁹ **D-1254**, pgs.9-10.

⁴⁰⁰ **D-1254**, pgs.14-16.

⁴⁰¹ Full spectrum operational dominance is when a force convinces its adversary that it possesses the initiative in every phase of the military operation, including the close battle, the deep battle, and any future battle. The greater the ability to demonstrate full spectrum operational dominance, the more likely it is that the adversary's will, cohesion, and combat effectiveness will be degraded. Accordingly, demonstrating full spectrum dominance is critical to precipitating rapid enemy capitulation. Effective demonstration of full spectrum dominance also increases the probability of rapid enemy capitulation, mitigating the losses to friendly and enemy forces. *Corn, T:21193:2-18*.

surprise are significant in achieving this effect.⁴⁰² NATO doctrine refers to this concept as the manoeuvrist approach.⁴⁰³

240. The manoeuvrist approach to attacking the will and cohesion of the adversary involves a synchronization of fire support, such as artillery, with operational manoeuvre and information operations.⁴⁰⁴
241. A “shock action,” consisting of a sudden, concentrated application of violence characterised by concentrations of direct and indirect fire,⁴⁰⁵ in conjunction with a high tempo of manoeuvre is a doctrinal tactic of the manoeuvrist approach.⁴⁰⁶ One key goal of a shock action is to reduce the enemy forces’ participation in combat or to induce their flight, panic, or surrender.⁴⁰⁷
242. Degrading the adversary’s will and cohesion is critical to seizing and retaining initiative while disrupting the adversary’s ability to respond. This contributes to the ability of an attacking commander to set the tempo of the battle and develop the operational and tactical execution according to his terms and not in response to the adversary’s dictates. Key military objectives for achieving this effect include “communication networks, command centres, transport nodes, or logistic facilities.”⁴⁰⁸
243. It is a doctrinal critical mission of fire support, such as artillery and rockets, to accomplish this objective in support of both the close battle (that point of tactical assault and breach of enemy defensive positions) while simultaneously striking the enemy in depth (in the rear areas against enemy C3I, logistics, and reserves) to allow the attacking commander to have the initiative and achieve full spectrum operational dominance.⁴⁰⁹

⁴⁰² **D-1254**,pg.2.

⁴⁰³ **D-1254**,pgs.9-10.

⁴⁰⁴ **D-1254**,pgs.2,10; **Konings,T:14552:21-14555:24**.

⁴⁰⁵ One of the doctrinally prescribed effects for artillery is a shock effect to influence the adversary’s decision making cycle. **Corn,T:21576:6-13; Konings,T:14562:18-25**.

⁴⁰⁶ **D-1254**;pgs.2-5; **Konings,T:14574:10-25**.

⁴⁰⁷ **D-1254**,pgs.2-4; **Konings,T:14558:8-14,14560:10-13**.

⁴⁰⁸ **D-1254**,pg.9.

⁴⁰⁹ **D-1253**;pgs.1-5; **Herrick,T:20075:2-13; Konings,T:14573:1-13**.

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⁴⁰² D-1254,pg.2.

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⁴⁰⁶ D-1254;pgs.2-5; Konings,T:14574:10-25.

⁴⁰⁷ D-1254,pgs.2-4; Konings,T:14558:8-14,14560:10-13.

⁴⁰⁸ D-1254,pg.9.

⁴⁰⁹ D-1253;pgs.1-5; Herrick,T:20075:2-13; Konings,T:14573:1-13.

244. Ultimately, the operational commander uses operational art⁴¹⁰ to seize and retain the initiative in battle and set the tempo of tactical operations, including deciding when, where and what assets to use against the adversary to gain the initiative and defeat the adversary's will and cohesion.⁴¹¹
245. A key to operational art is identifying the adversary's COG and determining ways to attack it.⁴¹²
246. The Prosecution's own purported artillery expert acknowledged the importance of attacking the adversary's COG,⁴¹³ which, for the ARSK during Operation Storm, was Knin.⁴¹⁴
247. Operation Storm was a large scale and extremely complex endeavor involving multiple axes of attack across a long confrontation line.⁴¹⁵ For this entire operation, Knin was the political headquarters of the RSK and the center of important military objectives, including C3I functions; logistics concentrations and lines of communication; and reserve forces and mobilization points.⁴¹⁶
248. Knin contained *inter alia* the ARSK Main Staff, the president's office and residence, several military barracks, the 7th Knin Corps headquarters, logistics stores, and choke points for critical lines of communication.⁴¹⁷ Attempting to disrupt C3I, logistics, reserve mobilization and movement, and lines of

⁴¹⁰ **D-1247**, pgs.4-15 (Operational art is commonly defined as the employment of forces to attain strategic and/or operational objectives through the design, organization, integration and conduct of operations).

⁴¹¹ **D-1247**, pgs.4-15.

⁴¹² **D-1247**, pg.47.

⁴¹³ **Konings, T:14577:20-14578:5; P-1113**, pgs.336-337 ("GOTOVINA sees Knin as the 'centre of greater-Serbian rebellion, psychologically and politically vital for the rebel Serbs.'") (Emphasis in original).

⁴¹⁴ **Berikoff, T:7676:6-20; Konings, T:14578:20-14579:4; D-756**, pgs.11-12 (for the HV to take back the Krajina, the most logical course of action would be to conduct a decisive attack against Knin because of its strategic and political importance); **D-1217** (Boucher), paras.16,35; **D-979** (6 August 1995 Meeting at Knin Castle) (GOTOVINA states that Knin was "the key military and political epicenter whose fall has caused the RSK to fall like a house of cards.").

⁴¹⁵ **D-1255**.

⁴¹⁶ **D-131; D-928**, pg.30; **Corn, T:21192:4-14**.

⁴¹⁷ **D-131; D-928**, pg.30; **Corn, T:21192:4-14**; [REDACTED]

[REDACTED] **D-1425** (Rajcic), para.48; **D-244; D-245**;

communications in Knin would be critical to the design of any operation, and was critical to the concept of operation and scheme of maneuver adopted by GOTOVINA.⁴¹⁸

249. Consistent with the manoeuvrist approach, the attack in depth on the military objectives in the COG and other areas would be synchronized with a manoeuvre scheme and fire support at the front lines.⁴¹⁹ Ultimately, as conceded by the Prosecution's expert witness and confirmed by Professor CORN, the design of Operation Storm set out in GOTOVINA's operational attack order was entirely consistent with this doctrine and reflected sound and logical operational decision-making.⁴²⁰
250. It reflects a commander who understood the imperative of planning and executing a decisive operation in depth, including the critical requirement to disrupt or disable the C3I and logistics capability of the adversary in order to set the conditions for success of breaching and exploiting enemy defensive positions and to demonstrate full spectrum operational dominance as a means of taking control of the COG and forcing capitulation of the enemy forces.⁴²¹

(b) Military objectives and anticipated effects of artillery

251. During Operation Storm's final planning, the Split MD command determined the effects necessary for each type of target to accomplish the mission. The effects artillery can achieve generally include destruction, neutralization, denial, harassment and disruption.⁴²² Destruction, however, is doctrinally

⁴¹⁸ **Konings,T:14584:5-9,14585:13-14586:6; D-1642,pg.24.**

⁴¹⁹ **D-1260.**

⁴²⁰ **Konings,T:14729:3-5; Corn,T:21533:18-21534:1,21543:8-20; D-1642:pg.27;**

Jones,T:20920:22-20921:14;20923:12-24; D-1633,paras.40-42; D-1253,pgs.44-45.

⁴²¹ **Corn,T:21310:2-10; P-1125(Defines the main operational goal as capturing key land, traffic, military and political facilities in the enemy's operational depth, and putting the enemy in a situation that forces them to either surrender or pullout, which fits within the widely accepted military doctrines discussed herein.); D-1578(Herrick),para.21(U.S. Military Attaché to Croatia testified he "was not surprised about the use of artillery during the operation. Any military planner would use artillery in this situation to take out the HQ and communications centers so that any break in the line could not be reinforced. Operation Storm was an almost classic example of an offensive military operation from a tactical standpoint.").**

⁴²² **P-1259,pg.14; D-1642,pg.8.**

disfavored because it is resource intensive and rarely necessary to support broader operational and tactical objectives.⁴²³

252. At the initiation of the attack, the artillery assets needed to set the conditions for HV forces to move to contact with the enemy's fixed defensive positions with minimal casualties. To achieve this effect, HV fire support assets would engage in simultaneous fires on the front lines and in depth.⁴²⁴
253. The first fires had to be the most powerful, firing at the ARSK front line targets and targets in depth such as the ARSK commands and communications to generate the strongest effect, and to create the perception among enemy C3I that HV forces were capable of sustained fire support action in depth.⁴²⁵
254. The defined priority of effort for the artillery fire was support to the forces engaged in the ground tactical assault on the front line, a priority that remained constant throughout the entire battle.⁴²⁶ As a result of resource limitations, this priority of effort limited the availability of fire support assets for use against deep targets.⁴²⁷ However, because disruption of ARSK C3I and logistics remained a secondary although nonetheless high priority, and because fire support assets were the primary available capability for achieving this effect, employment of artillery in depth could only occur consistent with the dynamics of battle after the artillery preparation phase.⁴²⁸

⁴²³ **Konings, T:**14532:17-14533:9; **D-1253**, pgs.2-8.

⁴²⁴ **D-1425**(Rajcic), paras.12-13.

⁴²⁵ **D-1425**(Rajcic) paras.14.

⁴²⁶ **P-1125**, pg.14.

⁴²⁷ In addition to ammunition limitations, half of the assets of the Split Military District were committed to preventing the VRS from reinforcing the ARSK or attacking the flank of the Split MD forces. Two artillery groups, TRS-1 and TRS-2, along with half of artillery group TS-3, were tasked with the VRS mission and, as such, were unavailable for use against ARSK military objectives. **P-1205**. As a result, on 4 August, only the remaining portion of TS-3 and TS-4 were available for fire support against military objectives in Knin. **Rajcic, T:**16279:18-22; **D-971**; **D-1425**(Rajcic), paras.16,33; **P-1205**. Of the assets within TS-3 and TS-4, seven T-130 mm guns had the Knin military objectives in range and firing sector. **D-971**. The organic rocket assets of the 4th and 7th Guard Brigades provided additional artillery assets for potential employment against Knin military objectives and for tactical purposes. These consisted of two (2) of the four (4) MRLS 122 mm BM21 rocket launchers of the 4th Guard Brigade and three (3) MRLS 122 mm BM21 rocket launchers of the 7th Guard Brigade. **P-1202**; **P-2443**; **P-2489**(4 GBR MRLS battery order: only 2 of 4 rocket launchers had military objectives in Knin in range according to the presented firing positions); **P-2473**(7 GBR MRLS battery report: 3 rocket launchers fired on military objectives in Knin); **P-1274**.

⁴²⁸ **D-1260**; **D-1425**(Rajcic), paras.35-42,61-63.

255. Thus, a concept for fire support was developed involving an initial short but intense bombardment of enemy objectives in depth in the form of artillery strikes. Because this rate of fire was not sustainable, the intense bombardment would be followed by prioritization of fire support effort in support of the ground tactical battle, with an economy of force approach used to disrupt and harass enemy targets in depth.⁴²⁹
256. This meant that the HV could only occasionally fire on military objectives in depth to neutralize, harass and disrupt ARSK facilities and personnel and to confuse and disrupt ARSK leadership by degrading their ability to effectively conduct their own battle plan and to respond to HV success.⁴³⁰ As RAJCIC told the Trial Chamber, “their purpose [was] to disturb or harass the command structure, to exhaust him, to tire them, and to make it impossible for the adversary to engage in the smooth functioning of coordination, command and planning ...[i]n this way a military advantage can be gained.”⁴³¹
257. The military advantage referred to by RAJCIC was clear: the isolation of enemy forward defensive positions and the disruption of enemy action to reorient defenses in response to HV ground tactical success, thereby facilitating rapid HV exploitation of such success.
258. During his testimony RAJCIC identified the military objectives within Knin selected for engagement during the targeting process.⁴³² In applying the manoeuvrist principles outlined above, the HV selected the following military objectives within Knin:⁴³³
- *The ARSK Main Staff and Ministry of Defense Headquarters:*
Contained the ARSK command and control, including communications

⁴²⁹ P-1125,pg.14; D-1425(Rajcic),para.63.

⁴³⁰ Rajcic,T:16541:10-16542:15(“...the thrust of the artillery attack of the Croatian army was aimed against the forward line of defense of the enemy and their tactical depth, where their artillery pieces were deployed, as well as the tactical targets which were the command posts of the brigades.”); 16438:12-16; D-1425(Rajcic)paras.11-16,42,63; [REDACTED] [REDACTED].

⁴³¹ Rajcic,T:16434:1-11.

⁴³² Rajcic,T:16254:25-16255:6;16256:6-12;16378:14-17.

⁴³³ D-1642,pg.24.

and operations centers, and was determined to be a critical C3I target.⁴³⁴

- *The Northern Barracks:* The main military barracks in Knin contained the headquarters of the 7th Knin Corps along with elements of the ARSK 2GBr, the headquarters of the ARSK MP and other supporting units, along with C3I capabilities organic to each of these commands.⁴³⁵
- *The RSK Telegraph and Post Office:* Telegraph and cable communications center used for both civilian and military purposes. HV intelligence was aware of its military use, which accounted for approximately forty percent (40%) of military communications for the ARSK.⁴³⁶ Furthermore, the communications capability facilitated by this exchange could provide redundancy for military communications disrupted by other attacks.⁴³⁷
- *Residence of the RSK President and Commander in Chief of the ARSK, Milan MARTIC:* MARTIC performed a dual role as both the President and Commander in Chief making his residence a high value military objective. It was determined that targeting MARTIC's residence would provide a definite military advantage not because of a high probability of killing MARTIC, but because it would disrupt the RSK strategic decision-cycle by interfering with his ability to influence the decisions made within both the RSK military and civilian structures.

⁴³⁴

[REDACTED] **Rajcic,T:16369:11-14;16370:15-22; D-923**(Mrksic states the ARSK could not be commanded from anywhere but the ARSK HQ because there were no other command posts sufficiently equipped); **P-1094**(Novakovic),para.2; **P-1095; D-929**(MARTIC stating he ordered shelling of Zagreb from HQ at 1930 hrs on 4 August); **D-930**,pg.9(Corroborates order to shell Zagreb); **D-1425**(Rajcic),para.15; [REDACTED] **D-1642**,pg.31.

⁴³⁵ **Mrksic,T:18879:1-19**(General KOVACEVIC of the 7th Knin Corps had his HQ in the Northern Barracks);19096:22-19097:6; **Konings,T:14608:23-25**("a headquarters of a corps is a military target, and it is even a - a very valuable military target."); **Rajcic,T:16371:22-16372:3,16372:10-22,16395:6-13,16552:15-22;** [REDACTED]

[REDACTED] **D-930**,pgs.7-8; **D-1257**,pg.2(HV Intelligence intercept showing KOVACEVIC in Knin communicating with front lines); **D-928**,pg.32(7th Knin Corps HQ moved out of N. Barracks the evening of 4 August 1995); **D-1278**(27 July 1995 order of 7th Knin Corps to collect conscripts at the N. Barracks); [REDACTED] **D-1425**(Rajcic),paras.15,59; **P-2331; D-928**,pg.31.

⁴³⁶ **D-1262**(40% of military communications go through PTT); **Novakovic,T:11861:11-23;** [REDACTED] **Rajcic,T:16371:1-13; D-1425**(Rajcic),para.15; **P-2330.**

⁴³⁷ **Corn,T:21574:11-16.**

Disrupting MARTIC's ability to influence RSK decision-making was considered critical because it would contribute to creating a sense of isolation among RSK defensive forces and it could interfere with his ability to coordinate supporting military action from Serbia.⁴³⁸

- *The Senjak Barracks*: Logistics base housing ARSK logistics headquarters, associated staff and military supplies. Disrupting the ability of resupply and reconstitution of ARSK defensive positions, and of the C3 for ARSK artillery assets, was essential to prevent the ARSK from mounting any coordinated counter-attack or re-disposition.⁴³⁹
- *TVIK Factory*: Used by the ARSK to produce military supplies including igniters for explosive munitions, while a portion of the factory was used as a storage facility for the ARSK.⁴⁴⁰ Targeting this facility would degrade the ability of the ARSK to re-supply its forces with the materials maintained therein.⁴⁴¹
- *The Knin Police Station*: Headquarters for the RSK police, which had been mobilized and integrated into the ARSK before Operation Storm.⁴⁴² Because this building maintained communications facilities for coordinating the actions of the police personnel, it was important to degrade or neutralize the C3 capability associated with these forces.⁴⁴³

⁴³⁸ D-1642,pg.32; D-1449,pg.3(Martic interview stating two (2) projectiles barely missed his flat on the morning of 4 August 1995); **Rajcic**,T:16448:3-10("goal was to make the main commander of the adversary insecure...and, if possible, if results would have been the killing of Mile Martic by shelling, that would have given us a significant military advantage.");16594:6-19;16612:10-19("repeated fire confirmed that the harassment and pressure effect had been achieved; in other words, that a sense of insecurity had been instilled in Martic.").

⁴³⁹ [REDACTED] **Konings**,T:14681:9-17(reasonable commander could assess Senjak Barracks as important); **Rajcic**,T:16391:20-25;16392:10-15; D-161,pg.6; D-923,pg.24(MRKSIC reports three ARSK trucks hit in Senjak and driver killed by artillery); [REDACTED]

⁴⁴⁰ D-949(September 1994 visit to TVIK by then Chief of ARSK, Gen. Celekitic to discuss the military production program at TVIK); D-242(TVIK-RSK contract for production of mine sets); D-244(ARSK Air Defence Order anticipating heavy air attack on TVIK); D-950(ARSK MOD proposal that TVIK be put into military service); **Rajcic**,T:16391:20-25;16392:16-19; D-1746,pg.217(Babic).

⁴⁴¹ D-1642,pg.32.

⁴⁴² A portion of the front line that the HV planned to attempt to penetrate on its path to liberating Knin was defended by RSK police officers. [REDACTED] D-941(2 August ARSK Report showing regular police are maintaining the frontline on the Dinara); D-237(2 August RSK MUP document regarding employment of police on the Dinara).

⁴⁴³ [REDACTED]

A battalion of these police forces occupied defensive positions in the Dinara, directly opposite the 7GBr along the main axis of attack making disruption or degradation of the C3 functions essential.⁴⁴⁴

- *The Railway Station:*⁴⁴⁵ The RSK's main railway yard, included a switch house necessary to change the direction for any train, including the ARSK armored train.⁴⁴⁶ This railway yard and switch station was also a choke point for the transit of RSK rail assets, which would be the only assets available to ARSK commanders to evacuate assets in the massive weapons depot several kilometers north of Knin. Rail assets would also be an important method of moving reinforcements to the front lines.⁴⁴⁷ Disrupting movements at this critical choke point was important to limit the effectiveness of troop and supply movements. In light of the limited fire support assets available for such counter-movement missions, exploiting the choke point was the most effective method of achieving the desired effect.⁴⁴⁸
- *Krka River Bridge and Butiznica River Bridge:*⁴⁴⁹ Bridges, such as these, are quintessential military objectives because their degradation substantially inhibits enemy freedom of movement.⁴⁵⁰

4. Gotovina's use of artillery was directed solely at military objectives

259. The Prosecution argues that because shells fell in different parts of Knin, the inference to be drawn is that the artillery attack was indiscriminate.⁴⁵¹ As set forth above, there were military objectives in different parts of Knin. Directing artillery at these targets does not give rise to an inference that attacks were indiscriminate. Furthermore, the principle of proportionality

Rajcic, T:16374:1-14; D-923(Mrksic reports that it was the police whose failure caused the HV breakthrough); **D-1217**(Boucher).para.12.

⁴⁴⁴ **D-1257**,pg.2; [REDACTED]

⁴⁴⁵ **P-2333; Rajcic, T:16373:21-22,16374:25-16375:15.**

⁴⁴⁶ **D-103; D-247;** [REDACTED]

⁴⁴⁷ **P-804**(4 August ECMM report indicating railway movement); **D-161**,pgs.7-8(31 July entry indicating use of rails for Golubic depot); **D-246; D-930**,pg.12(mentions loading rail with ammo from Stara Straza); **D-923**,pg.25(Mrksic notes evacuation of Golubic and Stara Straza was to take place via rail); **D-384**,pg.2; **D-387**(Reporting ammo in Stara Straza and Golubic); **D-715.**

⁴⁴⁸ **D-1642**,pg.33; **Corn, T:21586:13-21587:3.**

⁴⁴⁹ **P-2334; D-131; Rajcic, T:16375:23-16376:13,16376:19-22,16395:6-16.**

⁴⁵⁰ **D-1642**,pg.33.

⁴⁵¹ **98bis, T:17394:1-3.**

assumes that not all attacks will be able to hit only their intended objectives. Accordingly, the Prosecution must prove not that shells fell in different parts of Knin, but that the artillery fire was directed against civilians or was otherwise indiscriminate or disproportionate.

(a) Additional Protocol I: Military objectives, distinction and proportionality

260. Whether a particular artillery attack is unlawful is determined by the principles of distinction and proportionality as reflected in Additional Protocol I of the Geneva Conventions.⁴⁵² Three types of attacks are prohibited: (1) those directly targeting the civilian population or civilian objects (Arts. 51(2) and 52(1) of Protocol I); (2) indiscriminate attacks (Arts. 51(4) & 51(5)(a) of Protocol I); and (3) disproportionate attacks (Art. 51(5)(b) of Protocol I).⁴⁵³
261. In determining whether the accused acted with the requisite *mens rea* as set forth below, the Trial Chamber must consider whether the accused knew that his acts were unlawful as judged by reference to the facts and circumstances as “it appeared to the defendant at the time.”⁴⁵⁴ A military commander can only reasonably be expected to make an evaluation of the factual circumstances based on the information available to him during combat. As the U.S. Military Tribunal at Nuremburg elaborated in considering the “scorched earth” policy implemented in the Norwegian province of Finnmark by the accused Rendulic:

We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant’s decision to carry out the ‘scorched earth’ policy in Finnmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true,

⁴⁵² D-1642, pgs.10-11.

⁴⁵³ Galic, T.J, paras.54,55,56; D-1642, pgs.10-11.

⁴⁵⁴ *Hostages Trial: Trial of Wilhelm List and Others*, United States Military Tribunal, Nuremburg, United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Volume VIII, 1949, p. 68 (“*Hostages Trial*”); D-1642, pgs.6-7.

the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.⁴⁵⁵

262. Thus, “even though the conclusion reached may have been faulty” the accused cannot possess the *mens rea* for unlawful attack if he exercised reasonable judgment in perceiving that his acts were not directed at civilians or expected to cause excessive harm to civilians.⁴⁵⁶
263. Beyond considerations relating to mistake of fact or incidental death or injury, in determining whether civilian objects have been targeted or not, reference may be made to Article 52(2) of Protocol I which provides:

[M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁴⁵⁷

264. The ICRC provides an illustrative listing of what categories of targets are “considered to be of generally recognized military importance.” This list includes, but is not limited to:

- (1) Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.
- (2) Positions, installations or constructions occupied by [such] forces ... as well as combat objectives ...
- (3) Installations, constructions, and other works of a military nature, such as barracks, fortifications, War Ministries (*e.g.* Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.
- (4) Stores of army or military supplies, such as munition dumps, stores of equipment or fuel, vehicles parks.
- (6) Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
- (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance. [and]

⁴⁵⁵ *Hostages Trial*, pg.69(Emphasis added).

⁴⁵⁶ *Hostages Trial*, pgs.68-9; *Galic*, TJ, para.56; **D-1642**, pgs.6-7.

⁴⁵⁷ **D-1642**, pg.9.

(8) Industries of fundamental importance for the conduct of the war.⁴⁵⁸

265. According to the ICRC, objects which have a civilian character but are used for a military purpose (“dual use” objects) may be legitimately targeted, subject to the principle of proportionality:

In combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings ... will inevitably become military objectives because they offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses.⁴⁵⁹

266. For example, the *Committee Established by the Prosecutor to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* concluded that a Serbian TV and radio station was a legitimate target of NATO bombing, despite its predominantly civilian character, because it also functioned as part of the “strategic communications network” of the “military and national command authorities.”⁴⁶⁰ The Committee also gave as other examples of potential “dual use” objects “communications systems, transportation systems, petrochemical complexes, [and] manufacturing plants of some types.”⁴⁶¹

(b) Use and effects of artillery

267. At 05.00 hrs on 4 August, the Split MD commenced their portion of Operation Storm with a simultaneous attack on the ARSK front lines and military objectives in depth, including those within Knin.⁴⁶²
268. The initial artillery barrage, lasting approximately thirty (30) minutes, involved the highest rate of fire against Knin military objectives and included

⁴⁵⁸ ICRC, *Commentary to Additional Protocol I*, 1977, pgs. 632-633, n.3 (“**ICRC Commentary**”); **D-1642**, pgs. 8-10.

⁴⁵⁹ **ICRC Commentary**, pp. 620-1, para. 1953; **D-1642**, pg. 32.

⁴⁶⁰ *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, June 2000, para. 78 (“**NATO Report**”); **Galic, A.J.**, para. 194: ICTY Jurisprudence recognizes in principle that “dual use” objects may be lawfully attacked in appropriate circumstances.

⁴⁶¹ **NATO Report**, para. 37.

⁴⁶² **D-1096** (Cervenko Report).

both T-130mm guns from within the TS-3 and TS-4 artillery groups and fires from several MRLS 122mm BM21 rocket launchers from within the batteries of the 4GBr and 7GBr.⁴⁶³ Using x-y-z coordinates, this initial barrage was directed on the headquarters building housing the ARSK Main Staff, the Northern Barracks, the TVIK factory and the railway intersection.⁴⁶⁴ Contrary to the Prosecution's assertion that the alleged "complete lack of damage to military objectives" demonstrates that the HV was targeting civilians,⁴⁶⁵ an internal ARSK intelligence report from the morning of 4 August proves that even the ARSK recognized that the objects of the HV artillery attack were military objectives.⁴⁶⁶

269. The intended effect of MRLS on the select military objectives in Knin was degradation and harassment of ARSK C3I capabilities.⁴⁶⁷ This area denial effect could degrade communications capabilities by damaging wires, antennas, relay vehicles; and disrupt the ability of ARSK personnel to move freely in the area immediately surrounding the Headquarters to restore damaged or destroyed capabilities.⁴⁶⁸ It also disrupted the ability of ARSK personnel to move freely between the various military positions within Knin to provide C3.⁴⁶⁹
270. Both the Prosecution and Defence experts testified that MBRL's are weapons that are "capable of being directed against military objectives."⁴⁷⁰ The Prosecution did not challenge these conclusions even when presented by the Prosecution's own expert. Accordingly, the Prosecution cannot now assert that MRLS were an indiscriminate weapon.⁴⁷¹

⁴⁶³ D-1425(Rajcic), paras.16,35,59; D-1655.

⁴⁶⁴ D-1425(Rajcic), para.28; D-389; [REDACTED]

⁴⁶⁵ 98bis, T:17400:16-18.

⁴⁶⁶ D-389; Rajcic, T:16540:4-8.

⁴⁶⁷ Corn, T:21571:1-13.

⁴⁶⁸ D-1528; Mrksic, T:19129:7-14; [REDACTED]

⁴⁶⁹ Corn, T:21571:1-13; D-1425(Rajcic), paras.12-16.

⁴⁷⁰ Konings, T:14758:11-15; D-1642, pgs.20-21.

⁴⁷¹ The Prosecution argues Rajcic "admitted that using MBRLs against targets in a residential area would violate the rules of distinction and proportionality." 98bis, T:17400:4-6. As expert CORN pointed out, RAJCIC here was referring to a specific objective (killing MARTIC), and conflated the principle of distinction with the principle of proportionality. Corn, T:21520:3-12. RAJCIC did not suggest that MRLS were improper to use in Knin against the objectives for which they were ultimately used.

271. Throughout the remainder of the day, the intensity of fire remained high on the front lines and in the tactical depth, such as at Crvena Zemlja (or “Red Land”), which was the priority of effort for the advancing HV infantry.⁴⁷²
272. During both the initially high rate of fire and subsequent sporadic harassment and disruption fires, HV fire support directed at military objectives in Knin was precise and selective.⁴⁷³
273. The Prosecution claims that the so-called “harassment fire” was unlawful because it had no legitimate military purpose.⁴⁷⁴ On the contrary, the pattern of employment was consistent with doctrinally sound tactics and an operationally sound decision-making process. It also contributed to the critical retention of initiative by HV forces and to GOTOVINA’s ability to set the tempo of the battle.⁴⁷⁵
274. The simultaneous fire support through the depth of the battle space produced the desired effect on the cohesion and will of the ARSK. Many ARSK officers were unable or unwilling to hazard the bombardment and did not report for duty.⁴⁷⁶
275. Key C3I centers were effectively neutralized in the crucial early morning hours.⁴⁷⁷ MARTIC was still hiding, shirtless and barefoot, in a cellar at 07.15 hrs, more than 2 hours after Operation Storm began.⁴⁷⁸ Those who did report for duty such as to the Northern Barracks were in fear of the incoming rockets and artillery and did not want to move.⁴⁷⁹ As a result, fire support substantially contributed to the isolation of enemy defensive positions, and virtually disabled the ability of the ARSK to direct a coherent response to the tactical developments at the forward edge of the battle area.

⁴⁷² P-2489(Bajamic MBRL Order for 4th GBr); D-1260(Overlay of artillery and infantry maps); P-1274(Map of GBr Targets); [REDACTED] D-1425(Rajcic),paras.61-63; Rajcic,T:16537:14-19.

⁴⁷³ D-930,pg.7-8; [REDACTED]

⁴⁷⁴ 98bis,T:17399:4-12.

⁴⁷⁵ Corn,T:21438:2-10; Corn,T:21533:18-21534:1;21543:8-20. In addition, the employment of artillery was consistent with the HV’s use of its limited airpower assets during Operation Storm.

Corn,T:21256:20-21259:8;21263:22-21264:10,21265:12-21266:10; [REDACTED] P-2623; P-2625.

⁴⁷⁶ D-923,pg.22; D-930,pgs.8-9; [REDACTED] D-1266,pg.1; D-1267.

⁴⁷⁷ D-1256(HV Intercept showing Martic not at office by 07.00 hrs).

⁴⁷⁸ D-147; D-1256(HV Intercept showing Martic not at office by 07.00 hrs).

⁴⁷⁹ D-930,pg.8.

276. Most importantly, the HV artillery also significantly impacted the communications between the ARSK command and ARSK critical forward defensive efforts.⁴⁸⁰ This, in conjunction with the artillery use on the front line, impacted the ability of the ARSK to effectively respond to HV tactical success, and was instrumental in facilitating the rapid HV breach of ARSK defensive positions and exploitation of those breaches, which was the decisive point of the operation.⁴⁸¹
277. Despite the successful impact the HV artillery had on the ARSK, the battle for Knin was not over, much less the battle for the rest of the area involved in Operation Storm. The HV made significant gains, but the ARSK fixed defensive positions remained in many areas, and the exploitation of the breaches remained tactically limited.⁴⁸² During the evening of 4 August, UN personnel assessing the situation did not believe that the HV had advanced to a point where it was in position to liberate Knin.⁴⁸³ A concern grew that ARSK forces would rally in Knin to exploit the tactical advantage of urban terrain, and that this could lead to a “bloody last stand in the capital of the Krajina.”⁴⁸⁴
278. The fear that the ARSK would withdraw forces to Knin and fortify the city for an urban ground tactical battle was not speculative.⁴⁸⁵ HV intelligence was aware that the ARSK had made preparations for a decisive defence of Knin.⁴⁸⁶
279. In response to HV tactical successes on 4 August, MRKSIC called a meeting at 20.00 hrs, first to order the decisive defence of Knin; second, to shorten the ARSK defence front line; third, to order troops to defend Knin from the high ground on its outskirts known as Bulina Strana, where the ARSK had established the command post of the 7th Air Defense Light Artillery Rocket

⁴⁸⁰ D-1528; Mrksic, T:19129:7-14; [REDACTED].

⁴⁸¹ D-1463(Mrksic/Stanisic intercept); D-1257(HV Intel report on panic in leadership);

Vukasinovic, T:18538:14-19.

⁴⁸² D-814(Map showing confrontation lines); D-1258(BBC summary indicating Serb reports of lines holding).

⁴⁸³ D-123(Leslie on BBC at 23.00 hrs denying HV was ready to take Knin).

⁴⁸⁴ P-698, para.15.

⁴⁸⁵ [REDACTED]

⁴⁸⁶ P-2347, pg.3; D-1463; D-106.

Regiment; and finally, to order one battalion of the 75th Brigade to move from the Drnis area to Bulina Strana.⁴⁸⁷

280. At 21.58 hrs on 4 August, the HV intercepted a telephone call between MRKSIC and SIMATOVIC, during which MRKSIC discussed sending troops to the high ground to defend Knin as well as reinforcements to Gracac.⁴⁸⁸
281. MRKSIC's order required moving the 7th Knin Corps headquarters from Knin to a rear location. Although the HV anticipated this would happen,⁴⁸⁹ there is no evidence that HV intelligence became aware of this order and accordingly, it was completely proper to continue to target the headquarters.
282. Even had the HV become aware of the order, relocating a major operational headquarters in the midst of an ongoing and intense battle is an extremely complicated process, requiring a phased relocation of assets, synchronization of C3I capabilities between a temporary (or tactical) command post and the main command post involved in the movement process, and reestablishment of C3I capability at the new headquarters location along with re-assumption of C3I over all subordinate forces. Consequently, there was no certainty about when the transition could have been effectively completed. It also provided the HV with an opportunity to exploit the enemy C3I vulnerabilities attendant with such a relocation; and to further disrupt the efforts of temporary C3I assets to effectively control ARSK forces.⁴⁹⁰
283. At 23.10 hrs on 4 August, the HV intercepted a telephone call between MRKSIC and STANISIC confirming that the ARSK military leadership was still in Knin and that MRKSIC anticipated men sent by SIMATOVIC to arrive and assist in the defence of Knin.⁴⁹¹

⁴⁸⁷ D-244; D-245,pg.3; D-930,pg.7; [REDACTED] D-1516,pg.2; D-260; D-923,pg.8;

⁴⁸⁸ D-948(Simatovic Intercept).

⁴⁸⁹ P-71,pg.82.

⁴⁹⁰ Corn,T:21458:1-25.

⁴⁹¹ D-1463.

284. Shortly after the telephone call, there were reports of ARSK heavy weapons, including tanks, moving towards and through Knin.⁴⁹² These reports were consistent with MRKSIC's orders during the evening of 4 August including relocating a battalion of the 75th Brigade from the Drnis area to Bulina Strana, which necessarily required the troop movements toward and through Knin at a tactical level. In the midst of these ARSK movements, the 7GBr fired into Knin at 00.40 hrs on 5 August⁴⁹³ clearly in an attempt to harass and disrupt the ARSK operations.
285. Additionally, HV intelligence assessed that the leadership of the ARSK was still active in Knin directing the efforts of ARSK forward defensive forces.⁴⁹⁴ In fact, MARTIC and other top political and military leaders of the RSK/ARSK did not abandon Knin until between 03.00 and 04.00 hrs on 5 August.⁴⁹⁵
286. Because of the available information relating to the ARSK military objectives within Knin and the need for the HV to consolidate gains and continue to exploit tactical success, an artillery barrage began at approximately 05.20 hrs on 5 August against the newly established front lines, expected defense positions, and C3I, logistics, and reinforcement/reconstitution capabilities in Knin.⁴⁹⁶ This use of artillery during the morning of the second day of the battle was consistent with the operational design and military advantage gained on the first day of the operation.⁴⁹⁷
287. The HV's main tactical effort on the ground gained momentum following the artillery attack on that second morning. After a successful pincer movement, HV infantry entered Knin from the north at approximately 10.00 hrs on 5 August.⁴⁹⁸

⁴⁹² **D-124**,pg.5(SS SitRep reporting movement towards Knin); **D-727**; **D-120**(Quoting Leslie regarding tanks by Sector South Headquarters on 5 August); **D-1367**; **P-980**(Dawes),pg.7; **Berikoff**,T:7688:21-7690:25.

⁴⁹³ **P-2455**,pg.21.

⁴⁹⁴ **Rajcic**,T:16471:18-16472:8.

⁴⁹⁵ **D-929**.

⁴⁹⁶ **P-2347**; **P-744**,pg.3; **P-71**,pg.83.

⁴⁹⁷ **Corn**,T:21454:9-23.

⁴⁹⁸ **P-744**,pg.4.

288. Fortunately, the risk of a significant ARSK defensive effort in Knin did not materialize and the ARSK forces withdrew towards the enemy rear area. Minimal ARSK resistance in Knin enabled HV forces to rapidly sweep through the city, and arrive outside the UN headquarters at approximately 12.00 hrs. At that point, the capture of the enemy COG was effectively complete, the primary domino in the fight against the ARSK had fallen, and the operation to liberate the remaining RSK controlled territories would cease within days as a result.⁴⁹⁹

5. The Prosecution's artillery case: Reliance on false reporting by ARSK and unreliable witness testimony

(a) False reporting by ARSK and UN on 4 August

289. Although the doctrinally and operationally sound artillery employment did not cause the mass evacuation of the RSK, it became central to efforts to create international pressure to stop the HV success in accordance with the pre-Storm planning of both the "Krajina" Serbs and the UN/ICFY.⁵⁰⁰

290. At 06.30 hrs on 4 August, the ARSK sent JANVIER a protest letter falsely claiming that the HV was deliberately targeting civilians in Knin and elsewhere in the "Krajina."⁵⁰¹ Shortly thereafter, the ARSK transmitted a message from MRKSIC to JANVIER claiming that the HV was targeting the Knin Hospital as well as the Sector South Headquarters.⁵⁰² With ARSK Intelligence Department reporting that the HV was targeting military objectives, it is quite clear the ARSK knew that these allegations were false.⁵⁰³

291. The Sector South reporting parroted the ARSK propaganda.⁵⁰⁴ The UN misreporting was designed to achieve the objectives of the UN's Operation Active Presence, *i.e.* create quick condemnation of the Croatian offensive and bring international pressure on Croatia to stop its operation.

⁴⁹⁹ P-744,pg.4; Malm,T:8165:1-16(In area of Sector North, ARSK troops received order to withdraw to Bosnia on 5 August).

⁵⁰⁰ See Sections IV.E, IV.D.ii, and IV.D.iii.

⁵⁰¹ D-270.

⁵⁰² D-331.

⁵⁰³ D-389.

⁵⁰⁴ P-341; D-5; D-1367.

292. At this same time, while the HV had taken specific steps to avoid hitting any UN facility, the ARSK was firing rocket propelled grenades into the Sector South Headquarters⁵⁰⁵ clearly seeking to blame the HV and provoke international reaction. This is evident from NOVAKOVIC's phone call to JANVIER on the morning of 4 August, when he stated that the HV "targeted the immediate vicinity of the UNPROFOR Sector South Command using direct fire."⁵⁰⁶

293. With no mention of indiscriminate shelling or targeting of civilian areas, the UN's initial internal assessments of the shelling of Knin reported around 08.00 hrs on 4 August were accurate:

At 0500 hours 4 August the HV commenced a coordinated and concentrated artillery attack on Knin. Over a period of 30 minutes, it is estimated that 200 to 300 rounds landed in the centre of the city. At 0530 hours, the concentrated artillery attack subsided, however, harassment fire has continued, with approximately one round every 15 seconds landing in the city centre.⁵⁰⁷

294. At approximately 11.30 hrs on 4 August, FORAND left Sector South Headquarters to visit to the ARSK Main Staff.⁵⁰⁸ After his return, the UN assessments of the HV artillery use changed, as the UN reports for the first time included the allegation of "indiscriminate" shelling of civilian centres.⁵⁰⁹ Further, FORAND sent a letter to HV General NORAC protesting an "unprovoked" attack by the HV against Knin and other towns within the "Krajina," demanding that the operation cease.⁵¹⁰ There is no credible evidence either that FORAND sent a protest letter to GOTOVINA on 4 August or that it was received.⁵¹¹

⁵⁰⁵ Hill,T:3817:19-3818:7; P-301,pg.2.

⁵⁰⁶ D-331. The UN knew that the HV wasn't in direct fire range of Knin even as late as 23.00 on 4 August and therefore the HV couldn't have used direct fire against the UN compound that morning. D-123.

⁵⁰⁷ D-1655,para.2.

⁵⁰⁸ P-343.

⁵⁰⁹ P-341; D-5.

⁵¹⁰ D-332(HTV reporting Norac receipt of letter).

⁵¹¹ A copy of the same letter addressed to GOTOVINA was apparently sent via facsimile eight (8) days later to UN Headquarters in Zagreb at the request of then-Colonel Leslie in an attempt by certain UN officials to support the unsubstantiated allegations of misconduct made against GOTOVINA. P-83; P-84.

295. Before leveling allegations of improper artillery use, Sector South Headquarters had not received a single field report upon which to base these allegations. To the contrary, several hours earlier Sector South Headquarters received a UN battalion report about fire directed against the ARSK in Bunic causing military casualties.⁵¹² Despite this, FORAND's letter included only complaints about indiscriminate shelling of civilians in Bunic. The letter also included a reference to the shelling of civilians in Medak, an area of heavy ARSK resistance.⁵¹³
296. By 14.00 hrs on 4 August, Carl BILDT, the European Union's Special Representative for the former Yugoslavia, issued a public statement condemning Operation Storm and accusing TUDJMAN of "war crimes" for the HV's use of artillery within Knin.⁵¹⁴ As with FORAND's letters, the statement offered no specific details.
297. To compound the inaccuracies, PIO ROBERTS began broadcasting myths that the Knin Hospital had been struck by artillery fire necessitating the UN evacuation of patients.⁵¹⁵ This claim, initially made by the ARSK, was echoed by Sector South to justify UN assistance in moving ARSK soldiers, a clear violation of the UN mandate.⁵¹⁶

⁵¹² **P-340; P-100**,pg.2.(SitRep reporting on Bunic).

⁵¹³ **P-401**,pg.30.

⁵¹⁴ **D-61; D-747**.

⁵¹⁵ **D-1367**.

⁵¹⁶ **Forand,T:4450:15-23**. FORAND enlisted the resources of the Canadian Battalion to begin an evacuation of ARSK wounded from the Knin hospital to the Sector South HQ at 14.00 hrs on 4 August, yet he did not include these orders in his reports to UN headquarters in Zagreb. **P-314**,pg.2; **P-343**(4 August Sitrep making no mention of the evacuation). By mid-morning on 5 August, there remained only twenty elderly individuals and a few wounded ARSK soldiers in the hospital. **D-277**. FORAND tasked the last evacuation attempt to leave the twenty elderly individuals in the hospital and evacuate the remaining ARSK soldiers. However, the HV arrived at the hospital and refused the UN's request to move the wounded enemy combatants. **D-344**. While this prevented the evacuation of all of the ARSK soldiers from the Knin hospital, the UN succeeded in moving numerous ARSK soldiers to Sector South HQ prior to the arrival of the HV. **D-330**(Video showing ARSK soldier in Sector South Headquarters); **Forand,T:4450:9-14**. The claim that the hospital was shelled was merely a cover story provided by Sector South to the leadership in Zagreb to conceal the serious breach of neutrality. **D-1657**,pg.9.

298. The Sector South leadership adopted the exaggerated ARSK's claims without analysis or investigation, for the sole purpose of creating political pressure on Croatia to halt the operation.⁵¹⁷

(b) Testimony of Sector South witnesses was not credible

299. The primary source for the false allegations emanating from Sector South Headquarters was then-Colonel Andrew LESLIE.⁵¹⁸ Although greeted with great skepticism by the diplomatic community, his claims tainted perceptions within the Sector South Headquarters and contributed to the false impression that HV forces deliberately employed fire support assets indiscriminately and for an illicit purpose; an impression refuted by the objective evidence.⁵¹⁹

300. Although LESLIE and other UN personnel received notice of the impending attack during the evening of 3 August, LESLIE failed to raise the alert level or begin preparations in the Sector South Headquarters to protect UN personnel.⁵²⁰

301. Consequently, when the attack commenced at 05.00 hrs on 4 August, many UN personnel were unprepared, frightened, and in some cases asleep within their accommodations in Knin rather than within the safe area of the Sector South Headquarters.⁵²¹

302. Although the United Nations Military Observers ("UNMOs") counted between 350 to 400 artillery and rocket rounds fired into Knin by 10.40 hrs on 4 August,⁵²² long after the most intense period of fire ended, estimates in the

⁵¹⁷ **D-333**(Canadian report admitting exaggerations for political effect). The passage of time did not cure Canadian officials of their penchant for exaggeration. In 2003, Leslie claimed that the HV artillery use resulted in between 10,000-25,000 dead civilians in Knin, an absurd claim made by one of the primary proponents of the allegations that the HV's use of artillery during Operation Storm was in violation of the laws and customs of war. **D-329; Forand,T:4429:1-4432:9.**

⁵¹⁸ **Galbraith,T:5044:2-5.**

⁵¹⁹ **P-444**(Galbraith),para.44; **Galbraith,T:5045:14-5046:18.**

⁵²⁰ **P-444**(Galbraith),para.44; **P-546**(Bellerose),pg.3; **Dreyer,T:1754:4-24**(The decision on alert levels was in Leslie's hands as Chief of Staff. Based on his recollection, Dreyer states that the alert level changed at 04.00 hrs on 4 August.); **Forand,T:4114:7-14**(Forand was advised at 03.20 hrs that the HV might launch offensive.).

⁵²¹ **D-271**,ln.8(Hill Diary:"scared shitless"); **Dreyer,T:1725:5-1726:6; Leslie,T:2030:10-2031:23; D-121.**

⁵²² **P-101; D-1655**,pg.1; **Akashi,T:21661:3-11.**

Sector South Headquarters were ranging higher than 10,000 rounds per hour.⁵²³ Several factors contributed to this discrepancy.

303. First, Knin is in a valley surrounded by a mountainous landscape, causing an echo effect and amplifying the sounds of incoming and outgoing fire.⁵²⁴ Second, there was extensive exchange of artillery fire between the HV and ARSK at the front lines, which could be heard in Knin, a mere fourteen kilometers away.⁵²⁵ Third, there was extensive targeting of ARSK positions at Crvena Zemlja, between the front line and Knin, which could likewise be heard in Knin.⁵²⁶ These auditory effects contributed to the over-estimates of projectiles fired into Knin.⁵²⁷
304. Additionally, to the extent that UN personnel were eye-witnesses to the impacts of artillery and rockets, they were not in a position to provide an accurate assessment given their obscured vantage points, and the effects of surprise and fear.⁵²⁸ The inability to accurately assess impacts was exacerbated by the dispersion of legitimate military objectives throughout Knin which likely created the mistaken perception of random HV targeting.⁵²⁹
305. Given that LESLIE provided his *imprimatur* to the ARSK allegation of an indiscriminate artillery attack on Knin, it is unsurprising that his subordinates would perceive the kinetic effects of the artillery to have been consistent with LESLIE's assertions.⁵³⁰ The post-conflict reports, untainted by these defects and based on objective analysis, do not support LESLIE's erroneous conclusions but are instead consistent with a tactically and legally sound use of fire support assets.

⁵²³ P-1160(Al-Alfi),pg.28; [REDACTED]

⁵²⁴ D-393; Dijkstra,T:4776:15-17.

⁵²⁵ P-102; Gilbert.T:6424:4-16.

⁵²⁶ [REDACTED]

⁵²⁷ [REDACTED]

⁵²⁸ D-569(Photo showing trees UN balcony on 5 August 1995); D-570(Photo showing hills obscuring view from balcony); D-571(Exhibit showing targets behind hills).

⁵²⁹ D-572; D-131.

⁵³⁰ Corn,T:21249:17-21250:13;21255:14-17.

6. Post-Conflict analysis: Artillery attack was not directed against civilians

306. International observers began inspecting Knin as early as 7 August when a delegation headed by AKASHI arrived.⁵³¹ These inspections revealed that the artillery damage was concentrated on military objectives, that damage to civilian property was far less than reported, and that such damage was concentrated in close proximity to military objectives. These inspections completely undercut initial Sector South reports about the improper use of artillery.⁵³²
307. Experienced military and political personnel were among the first observers to assess the effects of artillery without the duress of being near the line of fire or facilitating the care and evacuation of refugees.⁵³³ They observed⁵³⁴ that a few buildings in Knin had evidence of artillery damage,⁵³⁵ and the targeting had been focused on specific military purposes.⁵³⁶ No evidence was found by these observers to support allegations of an indiscriminate artillery attack.⁵³⁷ In fact, their findings produced a prevailing view within the international community that Operation Storm had been executed in a legal and militarily legitimate manner resulting in limited civilian losses.⁵³⁸
308. These damage assessments are also consistent with multiple contemporaneous videos of Knin in the aftermath of its liberation by the HV.⁵³⁹

⁵³¹ Akashi,T:21621:3-6;21667:23-21668:8.

⁵³² D-29; Flynn,T:1302:6-9.

⁵³³ P-444(Galbraith),para.43; Galbraith,T:5045:10-18;5046:14-18(Basis for observation: three different embassy staff teams, with three different functions including military experts who had been following the war for years. Their expertise and observations led to his skepticism of Leslie's claim of massive shelling. In addition to the 14 August Cable, there were two additional code cables -- DART, political, and defence department -- which all came to the same conclusion with regards to shelling, and also with regards to many of the other observations.).

⁵³⁴ P-444(Galbraith),para.44; Galbraith,T:5043:20-25;5044:1-24(He recalls the UN, significantly based on Leslie, asserted that there was indiscriminate shelling of Knin but UN personnel including Leslie were basically locked down in the Sector South Headquarters.).

⁵³⁵ D-66,pg.1.

⁵³⁶ D-344,pg.2.

⁵³⁷ P-444(Galbraith),para.43; Galbraith,T:5044:5-5045:14.

⁵³⁸ Galbraith,T:5043:6-10; Elleby,T:3415:21-22. Even amongst those in the Sector South Headquarters, their perception of the artillery attack was not substantiated by their observations once they went into Knin. P-301,pg.4("Damages to the town were not as extensive as anticipated"); P-291(Hill),pg.6("I expected the town to be flattened; but as a matter of fact, I didn't see much damage"); Hill,T:3842:11-19.

⁵³⁹ D-14; D-70; D-107; D-108; D-276.

309. The initial allegations by the ARSK and Sector South officials that the HV hit the hospital in Knin were particularly troubling. Giving an inspection of the hospital high priority,⁵⁴⁰ the international observers visited the hospital only to confirm that those allegations were without merit.⁵⁴¹
310. In the ensuing days, there were additional efforts to more thoroughly assess the damage. The most significant effort was initiated by Lieutenant Colonel Steinar HJERTNES, the Senior United Nations Military Observer (“SMO”) for Sector South.
311. HJERTNES determined that a review of the physical evidence of artillery effects was advisable and tasked UNMOs to systematically review the observable artillery damage so that he could make an assessment.⁵⁴²
312. After reviewing 70% of Knin, it became evident that the damage from shelling was concentrated against military objectives⁵⁴³ and HJERTNES reported this finding to UNMO Headquarters in Zagreb on 18 August.⁵⁴⁴ His final assessment completed and transmitted approximately one week later was consistent with the preliminary assessment, *i.e.*, that the damage caused by HV artillery was concentrated against military objectives within Knin.⁵⁴⁵
313. The SMO’s finding was incorporated into the UN Secretary-General’s Report to the Security Council on 23 August which characterized the HV artillery and rocket fire support as “concentrated shelling.”⁵⁴⁶
314. Despite the evidence that the HV employment of artillery was operationally sound and legally permissible, LESLIE continued to attempt to substantiate

⁵⁴⁰ Flynn,T:1301:10-20.

⁵⁴¹ D-277,pg.2(US Code Cable saying no evidence of artillery or mortar on Hospital); [REDACTED] D-70; P-20(Flynn),pgs.3-4; Berikoff,T:7696:24-7697:3; Flynn,T:1302:6-1303:4; P-214(Elleby),pg.2(No damage near hospital, damage mostly near barracks).

⁵⁴² P-64.

⁵⁴³ Even with respect to the few impacts not assessed to be near a military objective, it was not possible to assess whether there were mobile targets present during the active combat. Anttila,T:2590:1-6.

⁵⁴⁴ P-64. On the same date, 18 August 1995, the United Nations Civilian Police (“UNCIVPOL”) conducted its own review of the damage to Knin on 18 August 95. UNCIVPOL counted 20 houses with evidence of artillery damage, and made no mention of widespread or excessive damage to civilian structures from artillery. P-228; Elleby,T:3371:6-7.

⁵⁴⁵ Roberts,T:7081:13-7082:6.

⁵⁴⁶ D-90,pg.2; D-1666,pg.3.

his initial exaggerations,⁵⁴⁷ which became increasingly embellished and magnified with the passage of time.

315. LESLIE attempted to portray the number of civilian casualties caused by HV artillery as excessive, initially claiming between 300-400 dead civilians around the Knin hospital.⁵⁴⁸ Later in 2003, LESLIE exponentially expanded his imaginative claim during a CBC radio interview to 10,000-25,000 civilian casualties in Knin.⁵⁴⁹
316. In contrast to such claims, the Prosecution has provided credible evidence of only one civilian in Knin who died from blast injuries.⁵⁵⁰
317. In addition, with respect to the minimal collateral damage in Knin, it is impossible to objectively differentiate between the damage caused by HV artillery and the damage caused by the ARSK firing artillery into Knin during Operation Storm.⁵⁵¹ For example, the ARSK was involved in several hostile actions directed against UN facilities and personnel on 4 and 5 August.⁵⁵²
318. Further, in the afternoon of 5 August, after abandoning Knin, the retreating ARSK fired rockets towards Knin from the direction of Serb-controlled Strmica.⁵⁵³ The only crater analysis offered into evidence related to an ARSK rocket fired on Knin from the direction of Strmica,⁵⁵⁴ which was in ARSK control until several days after the liberation of Knin.⁵⁵⁵

⁵⁴⁷ **D-129**(Excerpt of Berikoff diary regarding conducting a “favor” for Leslie).

⁵⁴⁸ This erroneous claim was made to his subordinate officer Berikoff. **Berikoff,T:7719:6-10,7722:17-7723:1; D-729,pg.3.**

⁵⁴⁹ **D-329; Forand,T:4429:1-4432:8.**

⁵⁵⁰ **Clark,T:14275:23-14276:1; Puhovski,T:15971:1-15972:24.**

⁵⁵¹ **Berikoff,T:7698:3-5.**

⁵⁵² **Berikoff,T:7643:10-12; Hill,T:3817:19-3818:7; D-5,pg.2**(SitRep regarding mines at gate on 4 August); **D-277,pg.2**(2 rounds fired into UN by ARSK). Additionally, the Chamber received testimony and other evidence regarding a number of mixed civilian and military casualties near the Sector South Headquarters in Knin which may have been caused by an ARSK mortar fired on the morning of 5 August. **Berikoff,T:7710:4-19; P-301,pg.2.**

⁵⁵³ **D-89,pg.4.**

⁵⁵⁴ **Anttila,T:2686:19-2689:3; Berikoff,T:7695:25-7696:11; Munkelien,T:1557:24-1576:12; P-60**(Munkelien); **D-80-D-89; D-166; D-167.** This record evidence reveals that the ARSK fired OGANJ 128mm MRLS into Knin on 5 August from the direction of Strmica, that the HV did not have this type of rocket in its arsenal during Operation Storm, and that the length of the rocket recovered by the UNMOs precluded a determination that it was an HV rocket whose 128mm rockets were only those of light MRLS systems in the infantry brigades which are significantly shorter in length than the rocket recovered by the UNMOs.

⁵⁵⁵ **Berikoff,T:7698:21-7699:19.**

319. While the Prosecution core theory is that a Brioni JCE may be inferred from large-scale unlawful shelling to terrorize Serb civilians, the evidence fails to support even a single conclusive finding that HV use of artillery violated the laws of war. Accordingly, there is no basis for a finding that GOTOVINA is liable for persecutory unlawful attacks, whether as part of JCE or any other mode of liability.

ii. The Prosecution has failed to prove that the HV unlawfully directed Psy-Ops at the civilian population

320. The Prosecution's assertion that Psy-Ops were directed at the civilian population during Storm has no evidentiary support. The only Psy-Ops directed at, and received by, the "Krajina" Serb population was the repeated radio broadcast by TUDJMAN calling upon them to stay and promising them full rights and amnesty for all except war criminals.⁵⁵⁶

321. For approximately one year prior to Operation Storm, Croatia tried to convince the Serb population to peacefully reintegrate through Operation Pax, a program aimed at the "peaceful annexation of the temporarily seized areas of the Republic of Croatia," through "psychological, propaganda and information activities intended for the consumption by the Serbian population in the protected areas of the Republic of Croatia."⁵⁵⁷

322. In the Operation Storm attack order, GOTOVINA identified the type of Psy-Ops to be used against enemy forces.⁵⁵⁸ Those tasks included "monitoring the enemy's psychological and propaganda activities, reporting to commands and units about it, and taking measures to weaken the enemy's psychological and propaganda activities."⁵⁵⁹ There is no mention in any order about targeting civilians with leaflets to coerce them into leaving Croatia.

323. The only information directed at Serb civilians during Operation Storm was TUDJMAN'S radio broadcast that civilians should stay in place. At the 3

⁵⁵⁶ **D-1809.**

⁵⁵⁷ **P-1113**,pg.300.

⁵⁵⁸ **D-201**,pg.2. Before Operation Storm, tasks of the Political Affairs Department included "coordination of measures in the fight against the enemy's psychological and propaganda activity," and "psychological and propaganda warfare against the enemy, jamming and confusion."

⁵⁵⁹ **D-201**,pgs.3-4.

August VONS meeting, TUDJMAN and the Croatian leadership explicitly had agreed that the President should personally advise the Serbs that they should surrender, and that Croatia would guarantee their rights.⁵⁶⁰ During Operation Storm, TUDJMAN delivered that message and stated that the Serbs can “stay at their homes and without fear for their life and property,” and that those not guilty of war crimes would be given amnesty under Croatian law.⁵⁶¹ Numerous Serb witnesses testified that they heard TUDJMAN’s message broadcast hourly.⁵⁶² The same message passed between Croatian and Serbian military personnel, *i.e.*, that Serb civilians should stay and that their safety was guaranteed.⁵⁶³

324. The Prosecution relies on portions of GOTOVINA’s book to claim that leaflets were directed against civilians. As indicated in GOTOVINA’s preface, the book was not intended to be a fully accurate representation of historical fact.⁵⁶⁴ Clearly, the portions of the book concerning leaflets were inaccurate; for example, that book claims leaflets were dropped only “*prior to Operation Storm.*”⁵⁶⁵ While it may make interesting reading, there is no evidence that leaflets were dropped prior to Operation Storm.
325. The Prosecution relies on exhibit P-480, a copy of a leaflet purported to be from MRKSIC. The only evidence that such a leaflet was dropped is a report from the commander of the HV’s 81st Guards Battalion indicating that they were dropped from a helicopter on the night of 6 August, more than two days after Serbs civilians had evacuated Sector South.⁵⁶⁶
326. Moreover, as can be seen in attached Appendix A, the leaflets were dropped in the zone of responsibility of the 81st Guards Battalion, which throughout Operation Storm was operating on the territory of Bosnia-Herzegovina and

⁵⁶⁰ D-1454,pg.22.

⁵⁶¹ D-1809.

⁵⁶² P-723(Mirkovic),para.3; [REDACTED] [REDACTED]
P-86(Sovilj),para.9; Ognjenovic,T:10715:15-21.

⁵⁶³ D-1461(Lazarevic),pg.27.

⁵⁶⁴ P-482,Part I(“the reality of war is very harsh, but this book does not dwell on the reality of the just war we waged, therefore some of the events depicted seem more attractive than they actually were...”).

⁵⁶⁵ P-1113,pg.457(Emphasis added).

⁵⁶⁶ P-483,pgs.3,7; P-1125,pgs.7-10.

manning a defense line against the VRS's Vaganj attack.⁵⁶⁷ Hence, the evidence indicates that the leaflets were not even dropped on the territory of Croatia, but rather were used against the VRS in Bosnia. Accordingly, there is no basis to conclude that these leaflets were directed at Serb civilians in the "Krajina" in furtherance of the alleged criminal objective.

327. The Prosecution also relies on GALBRAITH's testimony that SUSAK had "bragged" to him about "using psy-ops to get civilians out."⁵⁶⁸ However, GALBRAITH claimed that SUSAK said this was done through "electronic warfare" by "broadcast[ing] over the frequencies used by Serb radio stations."⁵⁶⁹ GALBRAITH made no mention of leaflets, and there is no evidence of Croatia using Serb radio stations. More importantly, GALBRAITH felt that SUSAK was "known to exaggerate" and "may have been taking credit for something that was happening anyhow."⁵⁷⁰
328. Moreover, the Prosecution did not produce a single witness who allegedly received a leaflet directed at civilians, much less a person who left Croatia as a result of it.
329. Quite simply, with no evidence that any unlawful Psy-Ops were directed at or received by any Serb civilians, the Prosecution has failed to meet its burden of proof that Psy-Ops were used to implement the alleged JCE.

iii. The Serbian JCE evacuated the Serbian population

1. Majority of Serb civilians left before HV arrived

330. The Prosecution's JCE theory is that the Serb population was forcibly displaced by large-scale unlawful shelling aimed at terrorizing civilians. The previous section indicates there is no evidence to support such an allegation. The evidence further demonstrates that the Serbs left because of RSK evacuation orders, thus making the JCE mass-expulsion theory wholly without merit.

⁵⁶⁷ P-483,pgs.3,7; P-1125,pgs.7-10; See Appendix A.

⁵⁶⁸ 98bis,T:17384:20-21.

⁵⁶⁹ P-444(Galbraith),para.61.

⁵⁷⁰ Galbraith,T:4941:21-4942:1.

331. The possible “bloody last stand” of RSK resistance in Knin was avoided, in part, by the decision on the afternoon of 4 August by the RSK leadership to execute its contingency plan of evacuating the Serb population.⁵⁷¹ The decision to evacuate was not the direct result of the use of artillery or Psy-Ops by the HV; rather, it was triggered by the ARSK’s inability to repel the HV and avoid encirclement, and the Serbian JCE’s policy of preventing sovereignty of Croatia over the Serbs at all costs. To fully understand the significance of the events on 4 August, a review of the RSK contingency planning for evacuation is necessary.

2. Evacuation preparations

332. Prior to Operation Storm, Serb intelligence assessed that civilians preferred to be resettled rather than to stay in the “Krajina” to face “encirclement and death.”⁵⁷²
333. Stung by criticism that it had not prepared for the evacuation of civilians from Western Slavonia and Grahovo,⁵⁷³ the Serb leadership had to simultaneously plan to use the RSK civil defense to evacuate the population to the RS and Serbia if Operation Storm was successful; while at the same time taking steps to prevent the growing population departure from “Krajina” after the fall of Grahovo. These departures were significantly undercutting ARSK defence efforts.⁵⁷⁴
334. The RSK Civil Protection was a pyramid system that went from the Republican Civil Protection, through regional and municipal staffs, all the way down to almost every building.⁵⁷⁵

⁵⁷¹ P-698, para.15.

⁵⁷² D-1495, pg.4. This was consistent with the views of the Serbian Orthodox Church (“SOC”), one of the most influential institutions amongst Serbs. Six days before Operation Storm, the head of the SOC, Patriarch Pavle, appeared at a large gathering in Knin and “rejected all possibilities for coexistence between Croats and Serbs.” **Liborius, T:**8588:4-23. Bishop LONGIN stated that in the event of a Croatian attack, he would advise Serbs to leave because allegedly “the Croats want a land without people.” D-934, pg.2.

⁵⁷³ D-1465, pg.241. Two days prior to Operation Storm, MLADIC in Drvar told the entire Serb leadership of the RSK and RS that civilians from Grahovo and Glamoc “are particularly bitter about the fact that the government organs provided almost no help at all in the evacuation and salvaging of property.”

⁵⁷⁴ D-923, pgs.16,20; D-1512; D-939; **Mrksic, T:**18825:6-18826:1.

⁵⁷⁵ **Novakovic, T:**11854:19-11855:2. This was confirmed by **Forand, T:**4383:4-4384:12.

335. The RSK had established a highly synchronized evacuation system, broken down according to three zones:
- Zone 1: Villages and towns along the frontline or within 10km of the frontline, which would include the towns of Benkovac, Obrovac, and Drnis;
- Zone 2: Villages and towns 20 km from the frontline;
- Zone 3: Small enclaves between tactical axes, specifically Srb and Donji Lapac.⁵⁷⁶
336. On 15 July the Regional Civil Protection issued an order to prepare and update plans for “evacuation and movement of the population.”⁵⁷⁷
337. In July, and perhaps into August, the RSK broadcast on TV Knin organized simulated evacuations from towns in both Sectors North and South to familiarize the population with the evacuation contingency plan in the event of further HV military success.⁵⁷⁸
338. After the fall of Grahovo, on 29 July an order was issued to “urgently update plans and preparations for shelter and evacuation of the population,” and daily reporting on such preparations was required.⁵⁷⁹
339. The RSK police, “due to the experience in Western Slavonia,” issued an order on 31 July to prepare for the evacuation of key documents including birth records: a clear indication that any evacuation would not be temporary.⁵⁸⁰ On the same day, the preparations for evacuation of civilians from Drnis were completed.⁵⁸¹
340. On 1 August, MRKSIC ordered preparations for the relocation of the ARSK Main Staff, including plans to destroy documents if necessary.⁵⁸² [REDACTED]

⁵⁷⁶ D-933,pg.8.

⁵⁷⁷ D-140.

⁵⁷⁸ D-136; Novakovic,T:11989:4-12; Mrksic,T:18820:4-5.

⁵⁷⁹ D-255; D-936.

⁵⁸⁰ D-254.

⁵⁸¹ D-138.

⁵⁸² D-1514.

- [REDACTED]
- [REDACTED]
341. On 2 August, Civil Protection ordered urgent reports by 19.00 hrs on 3 August concerning plans for sheltering and evacuation.⁵⁸⁴ That same day, Dusko BABIC issued an order requiring preparations for the evacuation of archives; birth, marriage and death registers; and materials of a confidential nature.⁵⁸⁵

3. Triggers for evacuation order

342. MARTIC's evacuation order was triggered by the dynamics of battle on 4 August. The HV artillery so disrupted the C3I of the ARSK, that by 10.00 hrs on 4 August, communications were cut between the ARSK command in Knin and the RSK police units which were defending the main point of the HV infantry assault in an area on the Dinara known as Crvena Zemlja.⁵⁸⁶
343. By 11.00 hrs, MRKSIC recognized that there was a danger of the Velebit front line falling to the forces of the MUP Special Police, putting Gracac in danger.⁵⁸⁷
344. Around 13.00 hrs, civilian convoys passed through Knin. Although mistaken by some for Knin residents, these were in fact civilians from frontline villages, such as Drnis and Vrlika, being evacuated from Zone 1 pursuant to the RSK's evacuation plans.⁵⁸⁸
345. Similarly, Obrovac, another Zone 1 town which was to be evacuated even before Storm commenced, began its evacuation very early on 4 August.⁵⁸⁹
346. By 14.00 hrs, the RSK leadership still hoped that the offensive could be stopped. MARTIC believed his forces were advancing in certain areas and that the international community would stop Operation Storm.⁵⁹⁰

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D-256.

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D-938.

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D-238,pg.4; D-1516,pg.2.

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Novakovic.T:11864:1-22.

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D-522,pgs.2-3; D-523; D-524;

347. Despite the shelling, there was no sign that Knin was beginning to evacuate.⁵⁹¹ ROBERTS told the media at 14.15 hrs that there was no panic in Knin,⁵⁹² and told CNN that “it is rather calm, but people inside Knin are rather concerned what may follow next.”⁵⁹³
348. MRKSIC reported to PERISIC that the HV “made a breach toward Crvena Zemlja at 14.30 hrs”⁵⁹⁴ At 15.00 hrs, MRKSIC told Radio Belgrade that the ARSK was “still firmly in control of the forward front line; the Croatian Army was unable to seriously breach our lines, except on the route leading from Grahovo via Crvena Zemlja to Knin.”⁵⁹⁵ MRKSIC also reported that he had no communications with ARSK positions on the Dinara, Svilaja, Promina, Gracac or Korenica.⁵⁹⁶
349. At 15.30 hrs ARSK soldiers began retreating from the Dinara in a panic into Knin. They were seen in the area of the hospital yelling “treason,” and doctors in the hospital immediately began asking whether the hospital would be evacuated.⁵⁹⁷
350. Around this time, the RSK police commander in Crvena Zemlja returned to Knin and stated that the “situation was bad, we had losses in combat, and our defence lines were disintegrating.”⁵⁹⁸
351. At 16.00 hrs, ARSK intelligence reported to Belgrade that the HV had taken over dominant peaks on the Dinara and was now positioned to break into the Knin vicinity, and that the MUP Special Police had broken through at Mali Alan on the Velebit at 15.00 hrs.⁵⁹⁹
352. At 16.00 hrs, MRKSIC told MARTIC that he had lost communication with his units in the Dinara foothills, more specifically Crvena Zemlja.⁶⁰⁰ MRKSIC

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[REDACTED]
D-1369; D-1370,pg.2.

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D-712; D-1374; Roberts,T:7092:16-7093:5.

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D-1369.

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D-1518.

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D-1258.

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[REDACTED]
D-161,pg.5.

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[REDACTED]
D-1519.

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[REDACTED]

feared that the frontline would be broken and that there was no second line of defence in that area. While the ARSK continued to resist, MRKSIC understood that continued resistance would result in street fighting and huge civilian losses and devastation.⁶⁰¹

353. Also around 16.00 hrs, MLADIC told MARTIC that he could not provide VRS assistance over the next three days causing MARTIC to become desperate.⁶⁰² MARTIC then realized that Vaganj would not be implemented and that GOTOVINA's forces would not have to face a VRS counterattack before HV infantry would be in Knin.⁶⁰³
354. By 16.00 hrs, the ARSK faced the possibility of encirclement, just as was discussed by GOTOVINA at the Brioni Meeting.⁶⁰⁴ After Grahovo fell, the only way to leave Knin and Sector South was the curving, winding road toward Otric and Srb.⁶⁰⁵ The breakthroughs on the Dinara (Crvena Zemlja) and the Velebit (Mali Alan) created a "major danger" that the last escape route would be cut off at the Otric notch.⁶⁰⁶ In light of this encirclement threat, the Serb leadership made a "political decision" sometime after 16.00 hrs.⁶⁰⁷
355. At around 16.30 hrs, MARTIC asked BABIC in Belgrade if the third element of their defence strategy, international intervention, could stop Operation Storm.⁶⁰⁸ BABIC said he had spoken to GALBRAITH, who said that the HV will not stop.⁶⁰⁹ BABIC told MARTIC to "pull the people out of there" and "get out of that hole."⁶¹⁰ MARTIC and BABIC then agreed that they would

⁶⁰¹ [REDACTED] UN personnel assessed RSK/ARSK options in much the same way. **P-968(Simic).para.15.**

⁶⁰² [REDACTED]

⁶⁰³ **P-461**, pgs.9,11,12,24-25.

⁶⁰⁴ **Mrksic**,T:18831:25-18832:13.

⁶⁰⁵ **Mrksic**,T:18929:12-25;18834:6-18835:19;18949:5-15; **Novakovic**,T:11960:4-16; **D-1516**,para.9; [REDACTED]

⁶⁰⁶ **Mrksic**,T:18930:18-18931:8.

⁶⁰⁷ This conversation was intercepted by Croatian intelligence. **D-927.**

⁶⁰⁸ This conversation was confirmed by **Novakovic**,T:11728:23-11729:3, and

⁶⁰⁹ **Mrksic**,T:18930:11-18931:8. The conversation between GALBRAITH and BABIC on 4 August is independently confirmed by **D-1993**. [REDACTED]

⁶¹⁰ **D-927.**

be “extracting the women and children” and “[c]onduct every action as planned.... [t]hen we’re going up as discussed.”⁶¹¹

356. By 16.30 hrs, it was clear that every element of the Serb strategy had failed:
- Negotiations in Geneva and with GALBRAITH failed to buy time;
 - MLADIC failed to launch Vaganj and would be unable to attack for at least several more days; and
 - No international intervention would stop the Croatian offensive.
357. The Serb leadership then activated the contingency plan from their strategy: the evacuation of the civilian population. At 16.30 hrs NOVAKOVIC was called to a meeting by MRKSIC to “see what we are going to do with the population, since it is at risk”⁶¹² that the “army and the entire population would find themselves encircled.”⁶¹³

4. Serb leadership evacuated the population to Bosnia

358. At 16.45 hrs, MARTIC signed the order to begin the “planned evacuation” of the non-combatant population from the municipalities of Knin, Benkovac, Obrovac, Drnis and Gracac through Otric and “towards Srb and Lapac.”⁶¹⁴ The ARSK Main Staff certified the order at 17.20 hrs.⁶¹⁵ Referring to the danger of encirclement at Otric, MARTIC’s order states that it is being issued because “a large part of the territory of Northern Dalmatia and part of Lika have become threatened.” Significantly, there is no mention of “shelling of civilians” as a reason for the evacuation order.
359. The evacuation order states that the evacuation is to go “towards” Srb and Lapac, with no final destination indicated. The town of Srb was home to 1450 people according to the 1991 census so it would have been logistically impossible for 32,000 civilians to be evacuated to a town that housed only

⁶¹¹ MRKSIC confirmed that BABIC and MARTIC agreed to evacuate the civilian population.

Mrksic,T:18934:12-17.

⁶¹² Novakovic,T:11728:14-17.

⁶¹³ Novakovic,T:11729:12-21. See also Mrksic,T:18935:7-18936:2; [REDACTED]

⁶¹⁴ D-137.

⁶¹⁵ D-137.

1450 people.⁶¹⁶ In fact, according to the Mayor of Knin, Drago KOVACEVIC,⁶¹⁷ and Dusan SINOBAD,⁶¹⁸ the Serb leadership had agreed that the evacuation would be to the RS, in particular Petrovac and Banja Luka. The Serb leadership then asked the UN to provide fuel specifically for the evacuation of 32,000 civilians to Petrovac and Banja Luka, which, unlike Srb, were large enough to handle the planned influx.⁶¹⁹

5. The evacuation order was publicized to the civilian population

360. The evacuation order was publicized to the civilian population at large. Indeed, it would have been impossible to move 32,000 people without telling them that they were being evacuated.
361. Around 17.00 hrs, the RSK MUP Minister issued an order to remove critical population records including birth records, a strong indication that RSK leadership intended that civilians would be leaving the area and would need their personal records outside Croatia.⁶²⁰
362. Between 17.30 and 18.00 hrs, the order to evacuate arrived in Benkovac.⁶²¹ At 18.00 hrs officials met in Benkovac to discuss implementation of the evacuation order,⁶²² and at 18.20 hrs, an order was issued for military logistics to be used to evacuate civilians.⁶²³ At 19.00 hrs, after the military in Benkovac received an order to evacuate the civilian population,⁶²⁴ the evacuation from Benkovac began.⁶²⁵
363. NOVAKOVIC testified that the evacuation order was kept secret until 18.00 hrs, and then was released to journalists and broadcast media.⁶²⁶ SEKULIC

⁶¹⁶ C-5(Gornji Srb had a population of 358 and Donji Srb had a population of 1090. Collectively they had a total of 445 houses, which, even if unoccupied, could not have housed the 32,000 evacuees.)

⁶¹⁷ D-326(Kovacevic quotes Mrksic as saying, "what do you mean by Srb, we need to go further than Srb... further toward Petrovac and... Banja Luka.")

⁶¹⁸ P-2362(Sinobad),para.26; Sinobad,T:16976:4-25.

⁶¹⁹ D-1520,pg.17; D-182; D-337,para.4; Forand,T:4422:4-12; Al-Ahfi,T:13884:2-13886:15.

⁶²⁰ D-254, [REDACTED]

⁶²¹ Vukasinovic,T:18560:18-18561:7.

⁶²² D-1499(Vukasinovic),paras.11-15.

⁶²³ D-161,pgs.6-7.

⁶²⁴ D-828,pg.3.

⁶²⁵ P-2362(Sinobad),para.25.

⁶²⁶ Novakovic,T:11814:24-11815:12.

reported that the decision was announced to the public at 20.00 hrs.⁶²⁷ LIBORIOUS,⁶²⁸ DYKSTRA,⁶²⁹ and HENDRIKS⁶³⁰ all confirmed that a radio broadcast relayed the evacuation order, with LIBORIUS reporting that the broadcast stated the destination for the evacuation was RS. On Radio Belgrade at 21.00 hrs MRKSIC announced that the ordered evacuation was underway “to prevent [the population] from falling captive, because Knin and the communications leading from Knin are in danger.”⁶³¹ FORAND was also on the radio that evening reporting on the evacuation order.⁶³²

364. It did not take long for the order to be disseminated and for civilians to respond. For example, in Knin, MARTI reported that at 18.30 hrs the situation was so calm that his UNMO team had been invited to a family home in Podkonje for “sauerkraut, meat, bread and rakija.”⁶³³ At 19.30 hrs, during the meal, the family broke into a panic because there was information that “the Croats were coming and nothing could stop them and they were going to kill us all.”⁶³⁴ With people demanding fuel to get away,⁶³⁵ the mass evacuation of Knin began around 20.00 hrs.⁶³⁶
365. VUJNOVIC testified that his family left on 4 August because RSK officials, some in military uniforms, came to his village and told everyone to leave because the “Ustashe” were coming. They were distributing fuel, and people left even though the village had not been shelled.⁶³⁷ MIRKOVIC testified to a similar evacuation of villages.⁶³⁸

⁶²⁷ D-928,pg.23; D-1516,para.6.
⁶²⁸ Liborious,T:8382:24-8383:10; P-804; P-1290,pg.5.
⁶²⁹ Dykstra,T:4784:9-4785:12.
⁶³⁰ D-820(Hendriks),pg.4; Hendriks,T:9747:1-16.
⁶³¹ D-106; D-713.
⁶³² D-328.
⁶³³ Marti,T:4672:23-4673:2.
⁶³⁴ P-417(Marti),para.35.
⁶³⁵ P-417(Marti),para.35.
⁶³⁶ [REDACTED]
⁶³⁷ Vujnovic,T:4566:1-4567:7.
⁶³⁸ P-723(Mirkovic),para.6.

6. The evacuation order: The Serbian JCE's response to military defeat

366. The realization of defeat was the primary motivator for the evacuation order and the mass evacuation from the RSK. It had nothing to do with allegedly unlawful use of artillery or Psy-Ops.
367. SINOBAD,⁶³⁹ LAZAREVIC, [REDACTED] and MRKSIC⁶⁴¹ confirmed the essence of MARTI's experience: civilians followed the evacuation order not because of shelling, but because of the fear that Croatia would successfully reclaim its territory. LAZAREVIC noted that "[e]veryone knew what had happened to the Croats in the "Krajina" in 1991...so there was a universal feeling that when the Croatian Army re-took the area, they would be out for revenge."⁶⁴² "In any event, people were so terrorized by their own government's propaganda that few would have risked staying in Croatia."⁶⁴³
368. Shelling was never mentioned in the diplomatic community as a potential cause of the Serb departure.⁶⁴⁴ As the UN Secretary General reported to the Security Council when reporting on the "orderly,"⁶⁴⁵ and coordinated⁶⁴⁶ exodus, "[i]t is thus difficult to determine the extent to which the mass exodus of the "Krajina" Serb population was brought about by fear of Croatian forces, as opposed to a desire not to live under Croatian authority or encouragement by local leaders to depart."⁶⁴⁷
369. FORAND did not claim that HV artillery initiated the exodus. He indicated that the mass departure of Serbs began when the evacuation order was issued. In September 1995 FORAND stated that the "critical" decision was "to evacuate the civilians from Knin and all the surrounding towns, and as soon as that was done, everybody started to flee away, including the military."⁶⁴⁸ In June 1996, FORAND told the Canadian military that the HV use of artillery

639 Sinobad.T:16969:8-16970:8.

640 [REDACTED]
641 Mrksic.T:18935:7-18936:2.

642 D-1461(Lazarevic),pg.28; Lazarevic,T:17948:4-17949:3.

643 D-1461(Lazarevic),pg.33.

644 [REDACTED]
645 Flynn.T:1308:15-18;

646 [REDACTED]
647 D-90,para.10.

648 P-398.

was “excellent” and that it was the RSK evacuation order that “inevitably initiated the general retreat that followed.”⁶⁴⁹

370. The departure of the “Krajina” Serbs was a logical consequence of the RSK ideology that Serbs and Croats could never live together. Savo STRBAC, a member of the Serbian JCE, explained from Banja Luka on 7 August the RSK’s decision to evacuate:

All of us who were in a position to speak to international officials constantly kept warning them of this fact and spoke of it, that the Croats didn't want to live with us and that we cannot allow ourselves to live with them so that the genocide committed against us in the past would not be repeated, and I use the term we "cannot allow ourselves" because it has a stronger meaning than "we do not wish to live with them," we do not and cannot of course live with them and because of this it was necessary first and foremost that we preserve our biological potential, our people. We could have died off. The civilian population could have been killed. Our civilians and women could have been killed. We need our biological potential for something that is hopefully yet to come.⁶⁵⁰

371. It was this mindset that resulted in the departure of (and not the *expulsion* of) the Serb population from Croatia.⁶⁵¹
372. In conclusion, in addition to the lack of evidence that Serbs fled because of terrorization by HV unlawful shelling, the RSK evacuation orders demonstrate that the allegation of mass-expulsion as part of Croatian policy is wholly inconsistent with the facts.

iv. JCE persecution charges: Burnings, lootings, and killings

1. Introduction: The Prosecution has failed to prove that there is “no reasonable explanation” of the evidence other than that there was an agreement to expel Serbs through burning, looting and killing

373. Without any proof of unlawful shelling and mass-expulsions, the Prosecution’s Brioni JCE theory completely fails. The Prosecution also alleges that the JCE included burning, looting, and killing, as other modalities

⁶⁴⁹ P-401,pg.21.

⁶⁵⁰ D-926.

⁶⁵¹ D-1736,pgs.127-129; D-1461(Lazarevic),pg.30; Lazarevic,T:17969:3-17970:12; P-723(Mirkovic),para.9; Mirkovic,T:7457:17-7458:12; P-2156,pgs.4-5; D-1992.

of persecution. However, since the two primary alleged modalities (unlawful shelling and mass-expulsion) are non-existent, it is exceedingly difficult to salvage a JCE theory based on these remaining persecutory acts. In any event, the evidence demonstrates that far from being part of Croatian policy, these acts were part of a post-combat crime wave resulting from lawlessness, and thus not linked to a JCE.

374. The Prosecution alleges that at Brioni, it was agreed (or at least understood) that burning, looting, and killing would be instrumentalities used to achieve the common purpose of expelling the “Krajina” Serbs.⁶⁵² The Prosecution also asks the Chamber to draw an inference based on the alleged scale of crimes that these crimes were ordered or approved in furtherance of the JCE.⁶⁵³
375. Pursuant to *Blaskic*, the Trial Chamber cannot draw the adverse inferences that the Prosecution seeks in light of the overwhelming evidence inconsistent with the Prosecution’s inferences.⁶⁵⁴ The Prosecution asks the Trial Chamber to infer that burning, looting, and killing was ordered or condoned in furtherance of the JCE, even though:
- a. TUDJMAN prior to Storm issued a direct order to JARNJAK to ensure that law and order was restored quickly in the liberated areas;⁶⁵⁵
 - b. SUSAK held a meeting with the entire military leadership on 2 August where he expressly prohibited “any kind of uncontrolled conduct (burning, looting, etc.);”
 - c. JARNJAK and SUSAK held a meeting with MORIC and LAUSIC on 2 August to make preparations to restore law and order to the liberated areas;

⁶⁵² **98bis**,T:17385:13-17386:2.

⁶⁵³ **98bis**,T:17388:10-13.

⁶⁵⁴ *Blaskic*,AJ,paras.518,519,521-523.

⁶⁵⁵ **D-2022; P-455**,pg.2; **Galbraith**,T:5072:11-19.

- d. LAUSIC and MORIC passed numerous orders directing crime to be prevented, investigated, and punished;
 - e. GOTOVINA, CERVENKO and others issued numerous orders before, during and after Storm to prohibit all types of undisciplined conduct including burning and looting; and
 - f. TUDJMAN and the leadership knew that if they fulfilled the U.S. Conditions (including protecting Serb human rights), there would be no diplomatic consequences for having launched the military operation.
376. Nevertheless, the Prosecution still urges the Trial Chamber to conclude that there is “no reasonable explanation of the evidence” other than that the entire Croatian leadership, civilian and military, was issuing orders which they had “no genuine intent” of implementing.⁶⁵⁶ This proposition is patently absurd, and per *Blaskic* the Trial Chamber cannot follow the Prosecution’s suggestions.⁶⁵⁷
377. In support, the Prosecution relies almost exclusively on GALBRAITH, who stated that he did not *believe* that the Croatian government made a serious attempt to restore law and order to the liberated territory.⁶⁵⁸ However, when challenged, GALBRAITH acknowledged that this was only his “belief” and that he “did not know of specific efforts” by the Croatian government, including the internal orders issued to stop crime, although he was generally aware that orders to prevent crime had been issued.⁶⁵⁹ GALBRAITH was never in Sector South during the indictment period and therefore had no firsthand knowledge of events on the ground.⁶⁶⁰
378. Furthermore, the Prosecution failed to put GALBRAITH’S position to LAUSIC and MORIC, the two men assigned to prevent criminality in the liberated areas. The Prosecution never confronted either LAUSIC or MORIC

⁶⁵⁶ **98bis,T:17444:12-15.**

⁶⁵⁷ **Blaskic,AJ,paras.518,519,521-523.**

⁶⁵⁸ **98bis,T:17387:1-8.**

⁶⁵⁹ **Galbraith,T:5049:8-22.**

⁶⁶⁰ **P-444(Galbraith),paras.48,49,52.**

with its core position that the two men had been issuing orders that they had “no genuine intent” of implementing. In light of this failure, one can only conclude that the Prosecution knew that their answers would not support the Prosecution’s thesis. Accordingly, any attempt now by the Prosecution to continue to push this argument should be given no weight by the Chamber.

379. The Prosecution claims that “the most comprehensive documented observations” of the alleged widespread burning and looting in the “Krajina” came from UNMOs “who conducted a systematic service to record the damage done to villages throughout Sector South.”⁶⁶¹ This review claimed that, by mid-September 1995, 13,600 out of 18,232 surveyed, or 73% of the property had been fully or partly destroyed, houses marked as “Croatian household” were spared looting and destruction, and the looting and burning of Serb houses was systematic and organized led primarily by HV members.⁶⁶² Neither the Prosecution’s contentions of a plan nor the extent of the destruction are supported by the evidence.
380. First, Croatian government institutions, civilian and military, did not plan, instigate, order, commit, aid or abet, the destruction and looting of Serbian property. There is neither evidence of any meeting at which such a plan was discussed, nor of a specific order to implement such a plan. To the contrary, the evidence reveals that Croatian institutions planned to quickly and orderly reestablish the Constitutional order within the liberated territories.⁶⁶³ This included establishing police stations, courts, and other essential governmental functions. Although governmental institutions were not as effective in implementing their reintegration plan as desired, experts in both post-war planning and policing testified that crime waves following major military operations are unfortunate byproducts that are difficult to control. As such, post-conflict crime waves do not *per se* establish the existence of a plan for these crimes to occur.⁶⁶⁴

⁶⁶¹ POS,T:460:21-23.

⁶⁶² PTB,paras.40-43; POS,T:460:20-461:20.

⁶⁶³ D-269; D-409; D-1634; D-2022; P-455.

⁶⁶⁴ Cross,T:20602:19-20603:23; D-1624.

381. Second, the crime wave affected Croatian and Serbian property alike and was perpetrated by various types of people acting independently. There was no organized and systematic effort to target Serbian property, particularly given the economically crippling IDP⁶⁶⁵ and refugee problem faced by the Croatian government.⁶⁶⁶ Moreover, the evidence demonstrates that this crime wave initially was small, grew following the liberation of the occupied territory, and then tipped in late August. The government ultimately regained control over the crime wave by late September 1995.
382. Third, the central piece of Prosecution evidence, an UNMO assessment of damage to allegedly Serbian property, is not credible and conflicts with other, more reliable evidence in the case.
383. Fourth, although not responsible for law and order in sovereign Croatia, GOTOVINA took all necessary and reasonable measures available to address concerns of subordinate units' involvement in destruction of property and looting prior to, during, and after Operation Storm.

2. Crime wave was not planned or approved by the Croatian government

384. There is no evidence of a plan to engage in or permit looting and burning in the liberated territories following Operation Storm. If such a plan existed, numerous Croatian government officials, by virtue of their positions, would have had to know about it. When asked, every official denied that any such plan existed.⁶⁶⁷ Moreover, in internal meetings and orders, it was expressly stated that the policy of TUDJMAN, SUSAK and the state leadership was to stop burning, looting and other illegal activity.⁶⁶⁸ In light of these express *internal* declarations of state policy, the Trial Chamber cannot reasonably conclude that the only reasonable interpretation of the evidence is the contrary.

⁶⁶⁵ Internally Displaced Person.

⁶⁶⁶ **Skare-Ozbolt**, T:18088:14-18092:7.

⁶⁶⁷ **Skare-Ozbolt**, T:18092:1-2; **Moric**, T:25741:25-25742:12; **Zuzul**, T:18327:4-9;

Bajic, T:20776:11-20777:2.

⁶⁶⁸ **P-918, D-595**, pg.5.

385. In fact, such a plan would have been contrary to Croatia's self-interest in complying with the U.S. Conditions.⁶⁶⁹ The problems encountered in stabilizing the liberated territory damaged Croatia's international reputation, and the need to stop and prosecute such criminal activities was discussed at the highest levels of the Croatian government.⁶⁷⁰
386. Contrary to GALBRAITH's view, many other international representatives who (unlike GALBRAITH) were actually in Sector South repeatedly stated that they did not believe that the looting and burning in the liberated territories was part of a government plan.⁶⁷¹ They understood that the looting and burning had a negative effect on the development and implementation of policy matters for Croatia.⁶⁷² One Croatian official noted that, given the numbers of displaced persons, "[i]t was extremely foolhardy to set houses on fire, because, for those people who were supposed to come back, it was difficult to find accommodation precisely due to the burning."⁶⁷³ RADIC on 22 August expressed this same frustration to TUDJMAN.⁶⁷⁴ Based on the foregoing, AKASHI indicated that he "did not in any way associate the continued burning and looting... with the Government."⁶⁷⁵
387. Accordingly, the views of these representatives amply demonstrate that the view of GALBRAITH and others is not the "only reasonable explanation of the evidence other than the guilt of the Accused."
388. With no foundation, the Prosecution nonetheless argues by circumstantial inference that the alleged scale of crime alone proves that there was a plan. *Blaskic* specifically rejected the "scale of crime" inference where there was other record evidence inconsistent with that inference.⁶⁷⁶ Here, numerous orders to prevent crime were issued by many different segments of Croatian civilian and military organizations. This fact alone is inconsistent with the

⁶⁶⁹ D-1485(Zuzul),para.25.

⁶⁷⁰ Skare-Ozbolt,T:18090:17-18091:4;18232:6-18; D-1485(Zuzul),paras.23,25; D-1818; P-463;

D-1451.

⁶⁷¹ [REDACTED]; D-

1646(Akashi),para.13; D-1662; D-714; Boucher,T:14042:8-14046:10.

⁶⁷² P-824,pgs.7,10; [REDACTED]

⁶⁷³ Skare-Ozbolt,T:18088:14-18092:7; Granic,T:24799:10-24799:21.

⁶⁷⁴ P-463,pgs.4-9.

⁶⁷⁵ D-1662.

⁶⁷⁶ *Blaskic*,AJ,paras.521-523.

Prosecution's suggested "scale of crime" inference, which must therefore be rejected.

389. Moreover, given the size of the area involved, its location along an international border, the return of IDPs and refugees, and the shortage of resources available to the Croatian government,⁶⁷⁷ an alternate inference consistent with acquittal is not only reasonable, but is the only proper conclusion supported by the evidence.
390. As post-operation security expert Major General CROSS testified, post-war areas are inherently unstable and there are numerous historic examples of the same problems Croatia encountered, such as in Cyprus, Northern Ireland, Kosovo, and Iraq. This belies a conclusion that the mere existence of crime is evidence of a plan for it to occur.⁶⁷⁸
391. Lack of thorough long-term planning and inadequate resources contributed to Croatia's difficulty in controlling the crime wave more quickly and efficiently.⁶⁷⁹
392. As set forth herein,⁶⁸⁰ the Chamber received evidence of numerous efforts made to establish law and order: coordination meetings between the appropriate government authorities to address issues as they arose; orders issued to stop the problems; private government meetings where the crimes were denounced and described as against government policy; public announcements to cease the criminal activity,⁶⁸¹ and hundreds of criminal prosecutions.
393. This evidence is sufficient for the Trial Chamber to conclude that there is a "reasonable interpretation of the evidence other than" that the Croatian leadership, including GOTOVINA, intended to allow burning, looting and killing in the liberated areas.

⁶⁷⁷ Albiston,T:24065:3-23; Moric,T:25645:8-25647:6; [REDACTED]
⁶⁷⁸ Cross,T:20602:19-20603:23; D-1624.
⁶⁷⁹ [REDACTED] Kardum,T:9251:18-22;9253:20-25;9254:12-25;9326:2-6;9458:3-22;
D-806; [REDACTED] Albiston,T:24063:12-20; D-1577.
⁶⁸⁰ See Sections V.D.iv.5 and IV.F.iii.
⁶⁸¹ D-1451.

3. Restrictions of movement were militarily justified

394. The Prosecution suggests that the GOTOVINA imposed restrictions of movement (“ROM”) on international personnel during Storm in order to cover up evidence of crimes committed by HV forces.⁶⁸² On the contrary, the ROM was entirely justified in light of the behavior of the UN before and during Storm.
395. As explained above,⁶⁸³ the UN prior to Storm put in place a plan to deliberately put UN troops in harm’s way, causing ALBRIGHT to strongly criticize the UN’s behavior. Knowing this, one of the U.S. Conditions was that Croatia was required to ensure that nothing happened to UN peacekeepers.⁶⁸⁴ In attempting to fulfill the U.S. Conditions, the HV put in place the ROM for reasons that were expressly stated to LESLIE at the gate of the UN compound on 5 August: “The Croatian Army cannot assume such a risk and cannot allow a single member of UNPROFOR/UNCRO [to] become a casualty in this area.”⁶⁸⁵
396. Because Operation Storm did not end in Sector South until GOTOVINA’s Active Defence Order of 9 August,⁶⁸⁶ the HV maintained some ROM while combat was ongoing. In addition to the U.S. Conditions, the HV was also motivated to impose ROM because UNCRO had been consistently attempting to sabotage the HV’s operation, in violation of its obligations of neutrality. For example, UNCRO violated its mandate⁶⁸⁷ by informing the RSK of the exact start time for Operation Storm.⁶⁸⁸ During the operation itself, the UN used open communication lines to reveal HV artillery positions⁶⁸⁹ and passed intelligence information to the ARSK command.⁶⁹⁰ UNCRO had also been passing along propaganda to the international media, falsely claiming that the

⁶⁸² PTB,para59.

⁶⁸³ See Section IV.E.

⁶⁸⁴ See Sections IV.F.ii and IV.F.iii.

⁶⁸⁵ D-126,pg.2.

⁶⁸⁶ D-281.

⁶⁸⁷ Forand,T:4387:6-10.

⁶⁸⁸ D-327; D-340; P-1092(Novakovic),pg.9; D-1461(Lazarevic),pg.27; Novakovic,T:11724:5-11725:2;11773:4-11776:25.

⁶⁸⁹ P-1183,pgs.4-5.

⁶⁹⁰ D-828,pg.2.

HV was shelling the Knin hospital. UNCRO violated its mandate in allowing ARSK combatants into the UN compound.

397. The HV simply could not take the risk of allowing UNCRO to engage in espionage and propaganda activities during an ongoing military operation, nor to risk UNCRO taking casualties. ROM were an entirely reasonable measure under the circumstances, and the Prosecution's suggested inference that GOTOVINA imposed ROM in order to cover up crimes cannot be accepted by the Trial Chamber because it is not the "only reasonable explanation" of the evidence.

4. Prosecution has exaggerated the scale of the crime base

(a) Post Operation Storm 5-9 August: Looting and burning was minor

398. On 5 August, HV elements arrived in Knin, having achieved success faster than anticipated.⁶⁹¹ The initial elements treated the civilian population and POWs properly and human rights monitors in Sector South reported that "at least some Croatian soldiers had been given clear and effective instructions to treat civilians in an appropriate manner."⁶⁹²
399. Indeed, FORAND after returning from his trip to the hospital on 5 August reported that "HV soldiers were not seen abusing civilians nor military but were fairly friendly."⁶⁹³ He did not report observing extensive, systematic looting or civilian bodies in the streets. An ECMM Situation Report ("SitRep") from 5 August confirms that "HV soldiers appear to be professional and are treating civilian population fairly."⁶⁹⁴ A Serb doctor also confirmed that HV soldiers treated those in the hospital correctly.⁶⁹⁵
400. Although most HV soldiers behaved professionally, in the euphoria of rapid success, there were breaches of discipline with HV members "lounging, and

⁶⁹¹ D-344; P-351,pg.4.

⁶⁹² D-272; D-334; D-66; D51; D269; D1379.

⁶⁹³ P-345.

⁶⁹⁴ D-334,para.6.

⁶⁹⁵ D-73; D-74; [REDACTED]

drinking beer in the yards of abandoned homes,”⁶⁹⁶ and international observers reported small scale looting on 4-5 August, both by Serbs leaving Knin⁶⁹⁷ and by Croats, including HV, in the immediate aftermath of the liberation.⁶⁹⁸

401. A report from 6 August reflects the small scale looting by HV soldiers was generally limited to beer and portable radios.⁶⁹⁹ Witnesses testified that it was conducted by the low ranks, and was never observed to take place in the presence of officers.⁷⁰⁰ While one ECMM report written before monitors were able to enter the town in the afternoon of 6 August claimed that looting was “widespread,”⁷⁰¹ later that day the ECMM entered the town and reported that the looting turned out to be “minimal.”⁷⁰²
402. Two Sector South MPs who went into Knin three times on 6 August reported that the military and civilian police were already taking control of the city and reported less damage to Knin than anticipated.⁷⁰³ These contemporaneous written reports included no reports of widespread or systematic looting or property destruction.⁷⁰⁴

⁶⁹⁶ **D-66.** As explained by Lt. Gen. Anthony JONES, an army is most vulnerable upon achievement of an objective when the natural reaction is to lose focus and relax. The difficult job of the operational commander, GOTOVINA, is to fight against the natural reaction, regroup and then refocus his troops on the fight ahead. **Jones,T:20917:7-20918:1;20918:13-16;20947:16-20949:11.**

⁶⁹⁷ **D-66.**

⁶⁹⁸ **D-272; P-805.**

⁶⁹⁹ **P-351**,pg.4; **P-72**(Dreyer),para.20.

⁷⁰⁰ **Williams,T:9548:9-16; Boucher,T:13972:25-13973:3.**

⁷⁰¹ **P-826.**

⁷⁰² **P-827.**

⁷⁰³ No doubt the expectations of damage to Knin were inflated by the irresponsible claims made by Colonel Leslie and others in the Sector South leadership relating to the HV use of artillery. See Section V.D.i.5.

⁷⁰⁴ **Forand,T:4493:17-4494:8; P-351**,pg.4; **P-301**,pg.4(UN MP Report of activity from 4-7 August). This contemporaneous report paints a different picture than the recollection of HILL given 14 years later in which he tells of a scale of destruction which, if accurate, would certainly have been included in the report. This discrepancy was a consistent theme in HILL’s testimony. Compare **Hill,T:3750:5-8 with D-274** pg.2(No bodies by the UN Gate); compare **Hill,T:3751:4-7 with D-274**,pg.2; compare **Hill,T:3779:11-15 with D-280** and **Hill,T:3868:18-3869:6**; See also **Hill,T:3841:6-3842:19;3868:8-10**. It is significant that even despite a tendency to exaggerate over time, HILL still did not believe the looting he observed in Knin was done according to a plan. **Hill,T:3851:12-15; Theunens,T:12741:9-17.**

403. By the evening of 6 August, FORAND was reporting to his superiors that a “sense of normalcy” was returning to Knin, and did not mention any systematic burning or looting.⁷⁰⁵
404. On 7 August, ECMM continued to report that the looting was “small scale,” “random,” and “very unlikely to be the deliberate policy of the authorities.”⁷⁰⁶
405. Indeed, the looting and burning was of such a small scale that it was never mentioned to AKASHI, FLYNN, or the international media when they arrived in Knin on 7 August. FLYNN agreed that there was a sense that the HV soldiers were behaving professionally and in a correct manner, and that the situation seemed “relatively stable and under control.”⁷⁰⁷
406. AKASHI reported to the UN in New York (ANNAN) that HV soldiers “did not appear overly unruly,” and “several of the shops still had cheap household goods and clothes on their shelves.”⁷⁰⁸ AKASHI did not report seeing, or being told of, any evidence of systematic burning and looting in Knin or the surrounding areas. Furthermore, AKASHI received a situational briefing from UN personnel in the compound,⁷⁰⁹ and would have in all probability included it in his report had he been told of systematic looting.⁷¹⁰
407. AKASHI and FLYNN flew into Knin by helicopter from Split (and thus over much of Sector South), and did not observe any smoke of noteworthiness.⁷¹¹ In his report to ANNAN, AKASHI made no reference to observing or being told of burning of houses.⁷¹²
408. The international media also arrived in Knin on 7 August via AKASHI’s helicopter,⁷¹³ and quoted Sector South officials as saying that the HV was

⁷⁰⁵ P-352.
⁷⁰⁶ P-805.
⁷⁰⁷ Flynn,T:1306:6-12.
⁷⁰⁸ D-29.
⁷⁰⁹ Akashi,T:21672:18-20.
⁷¹⁰ Akashi,T:21682:1-8.
⁷¹¹ P-20(Flynn),pg.3.
⁷¹² D-29.
⁷¹³ D-29,para.1.

behaving “with discipline and in a correct fashion,” and that there were no significant breaches of human rights.⁷¹⁴

409. Accordingly, the contemporaneous evidence provides a “reasonable explanation” other than that there was “widespread burning and looting in Knin and the liberated areas” in the immediate aftermath of Storm.

(b) The Prosecution’s witnesses concerning burning and looting from 5 to 9 August lack credibility

410. The Prosecution relies on the testimony of witnesses such as LIBORIUS, MARKER-HANSEN, WIDEN and BOUCHER to support its allegations of widespread and systematic looting in Knin from 5 to 9 August. Their testimony and recollections are highly questionable because contemporaneous SitReps of UNCRO, ECMM, UNMO, and UNCIVPOL record none of their observations on this issue. In addition, none of their alleged observations were relayed to FLYNN, AKASHI, or the international media present in Knin on 7 August.
411. The Defence does not suggest that no looting took place. However, the looting was minor, not systematic, and not condoned or organized by the HV commanders. The type of pillaging described by some of the Prosecution’s witnesses most certainly would have been documented and reported to AKASHI, FLYNN and the international media. It was not.
412. The recollection of these witnesses was deeply affected by being confined in Sector South with Serb refugees who were telling exaggerated stories about the conduct of the HV. As MARKER-HANSEN wrote in his diary: “The rumour mill is also a refugee in the [UN] camp. Where no information comes in from outside, it is produced inside. I often have to kill off myths, particularly about how the dead are being burnt in churches and prisoners are being shot in the town park.”⁷¹⁵
413. The confusion stemming from unprepared and overwhelmed UN personnel led to exaggerated or false stories circulating throughout Sector South

⁷¹⁴ D-63; D-64.
⁷¹⁵ P-1292,pg.8.

Headquarters about the initial elements of the HV.⁷¹⁶ For example, BERIKOFF, an experienced officer, suggested in his diary that because there were so few young Serb women in Sector South Headquarters, “[o]ne would have to surmise that they have probably been raped, used for the enjoyment of the Croat soldiers then killed or they may have been forced into prostitution.”⁷¹⁷ There is no evidence to reflect any such conduct by the HV soldiers.

414. There is no question that when the HV arrived in Knin, they conducted security sweeps through the towns, searching for weapons and enemy soldiers. Reports by refugees in Sector South often misinterpreted these actions as HV involvement in looting.⁷¹⁸ Similarly, pursuant to GOTOVINA’s order, the HV was engaged in the collection of war booty. It is highly doubtful that Serb refugees understood this process either. When the ARSK fled, they left behind large caches of weapons, some with booby traps.⁷¹⁹ On occasion, the rapid searches for weapons required ransacking several locations.⁷²⁰
415. Suffice it to say that, absent contemporaneous written corroboration, the Prosecution cannot prove that the “only reasonable explanation of the evidence” is the oral testimony of its witnesses. The Serb refugees, fearful and distraught, unquestionably misunderstood the security procedure taken by the HV, and exaggerated their scope. Sector South personnel did not observe these events but rather heard of them from the displaced Serbs in the camp and, under those circumstances, the Trial Chamber cannot rely on this testimony as evidence beyond reasonable doubt.

(c) Exaggerations of burning in Kistanje

416. The Prosecution relies on claims by BERIKOFF and GOJANOVIC that by 9 August Kistanje had been 95% destroyed.⁷²¹ These exaggerated stories are

⁷¹⁶ **Boucher,T:14056:17-14058:12.**

⁷¹⁷ **P-748,pg.8.**

⁷¹⁸ **D-336.**

⁷¹⁹ **Hill,T:3857:7-12; Galovic,T:19684:24-19685:2; D-57,pgs.3,10,18,25,28,37,54.**

⁷²⁰ Outside Knin, the initial elements of the HV also had to secure the area of weapons, and ransacking of personal effects could easily have been confused with the looting that unfortunately came as the civilians returned the area. **PW-P69,T:2725:2-20;2753:16-2754:7.**

⁷²¹ **98bis,T:17411:11-17**

not credible and run counter to the video recorded by FLYNN on 12 August. When FLYNN visited Kistanje with ROBERTS on behalf of the UN, he testified that “7 or 8 buildings... had been set on fire,” that “there wasn’t a strong military presence there,” and that “the place seemed almost to be deserted.”⁷²² This is corroborated by FLYNN’s 12 August video, from which one can see only five destroyed houses.⁷²³ ROBERTS himself can be seen on the video taking photographs.⁷²⁴ If in fact the almost deserted Kistanje had been 95% destroyed, either FLYNN or ROBERTS would certainly have documented the destruction. They did not do so because the destruction by 12 August was minimal.

417. Other eyewitnesses also confirmed that the damage to Kistanje was minimal in the early days after Operation Storm. MILAS,⁷²⁵ GALOVIC,⁷²⁶ PERKOVIC,⁷²⁷ and JURIC⁷²⁸ all corroborated FLYNN’s testimony and video.
418. The UNMO reports also refute BERIKOFF’s claim that Kistanje had been virtually destroyed by 9 August. The 4 November UNMO assessment reports that 101 of the 547 structures in Kistanje had been completely damaged and 63 partly damaged.⁷²⁹ Moreover, AKASHI reported to ANNAN on 16 August that 200 houses had been burned in Sector South, including Kistanje, making it highly unlikely that Kistanje alone was “95% destroyed.”⁷³⁰
419. The significant damage done to Kistanje occurred in subsequent weeks and months after Storm. The Knin-Sibenik road via Kistanje was used extensively by looters after Operation Storm.⁷³¹ Kistanje was a known stronghold of the ARSK,⁷³² making it a particular target for revenge by returning Croats. A reasonable explanation of the evidence is that the significant destruction in

⁷²² P-20(Flynn),pgs.18-21.

⁷²³ P-26.

⁷²⁴ P-26(at 02:34 of video).

⁷²⁵ Milas,T:19193:1-19194:14.

⁷²⁶ Galovic,T:19688:20-19689:9.

⁷²⁷ Perkovic,T:19459:4-8,19539:10-19.

⁷²⁸ Juric,T:27440:12-27441:5.

⁷²⁹ D-1326; D-176.

⁷³⁰ D-1534.

⁷³¹ [REDACTED]

⁷³² P-754(at 10:46 of video).

Kistanje was caused after Operation Storm by looters and other criminals crossing through the town who were intent on inflicting revenge, and not by HV forces.

(d) **The scale of crime after 9 August was also grossly exaggerated by international monitors**

(i) **Scale of crime exaggerated by the UN and ECMM**

420. After Operation Storm, allegations about the scale of crime grew wildly as incorrect and manipulated information was passed within the international community. Had the scale of crime been so widespread, UN officials would of course have raised the matter with Croatian government leaders. They did not.
421. On 16 August, AKASHI met with SARINIC, and did not raise the issues of arson or looting.⁷³³
422. Moreover, the estimates of damage were completely inconsistent. On 16 August, AKASHI reported to the UN in New York that **an estimated 200 houses had been destroyed by fire in Sector South beginning after 8 August 1995.**⁷³⁴ **On the same date, Liborius' ECMM report claimed that 60-80% of properties in Sector South had been destroyed.**⁷³⁵
423. On 23 August, the Secretary General's report to the Security Council makes no mention of property destruction on the scale alleged within Liborius' ECMM report.⁷³⁶ The Croatian Government relied upon the Secretary General's report while questioning the exaggerations emanating from certain internationals in Knin.⁷³⁷
424. This vast difference in reporting raised skepticism within the Croatian government as it appeared that these exaggerations were part of a negative

⁷³³ **D-1646**(Akashi); **D-1658**; **D-1659**; **Zuzul,T:18364:4-9**(was not his impression that in the weeks following Operation Storm the international community came forward with information of massive-scale violations of human rights).

⁷³⁴ **D-1534**,para. 7.

⁷³⁵ **P-856**(Emphasis added).

⁷³⁶ **D-90**.

⁷³⁷ **D-1820**,pg.3.

propaganda campaign,⁷³⁸ similar to the campaign following Operation Flash.⁷³⁹

425. Despite frustration with international observers, the Croatian authorities never denied that a problem existed and acknowledged their struggles in bringing it under control. As discussed herein, there are diametrically opposed reports from international groups: one not suggesting the involvement or direction of the Croatian government, and the second reporting a campaign of looting and property destruction directed by the Croatian government.⁷⁴⁰
426. The Sector South Canadian contingent was central to the negative propaganda campaign, admitting to spreading exaggerated information for political effect.⁷⁴¹ For instance, on 12 October, FORAND irresponsibly issued a press statement⁷⁴² falsely claiming that an UNMO report stated that “over 16,578 [houses in Sector South] were destroyed by fire or severely damaged.”⁷⁴³ FORAND’s estimates had little or no factual support.
427. By 16 October, the number grew and the UN Russian delegation claimed that it had counted an astonishing 22,000 burned houses in former Sector South.⁷⁴⁴ Undoubtedly, the underlying source material being publicly manipulated was the same UNMO report.⁷⁴⁵

⁷³⁸ **Granic,T:24748:18-24749:17;24753:6-11; D-1818; P-453**,pg.6(Transcript of Presidential Meeting – Holbrooke tells Tudjman allegations were exaggerated); **D-1816**(Transcript of Presidential Telephone call on 25 August 1995 – Kohl tells Tudjman there is a campaign against Croatia).

⁷³⁹ **D-1668**,pg.2(Human Rights Watch Report confirming that Akashi exaggerated claims of massive human rights violations).

⁷⁴⁰ Note that during the month of August, while ECMM, UNMOs and others are claiming that 60-80% of the houses in the territory have been destroyed by an arson and looting campaign, neither Galbraith, Holbrooke, or Akashi ever raise the issue of burning and looting with Tudjman. [REDACTED]

[REDACTED] **D-1646**(Akashi),para.13; **D-1662; D-714**.

⁷⁴¹ **D-333**(Canadian report admitting exaggerations for political effect).

⁷⁴² **P-400**.

⁷⁴³ As discussed further, *infra*, even if **P-66**, the version of UNMO report in question, was accurate and included only damage occurring after Operation Storm, and differentiated arson damage from other damage, there is no valid reading of the report to support the assertion that 16,578 houses were severely damaged by fire. The report purported to include houses with such minor damage as a broken window, making FORAND’s representation hopelessly inaccurate. **P-63; Anttila,T:2617:5-2618:18**.

⁷⁴⁴ **D-1663**.

⁷⁴⁵ **D-1664**.

428. This exaggerated, patently false, ever growing number continued to be used by international organizations more concerned with political pressure than accuracy. By 2001, the Croatian Helsinki Committee (“CHC”) was pushing the claim that “[i]n the former UN Sector South, at least, 22,000 houses and a number of villages were burned in a systematic and organised manner.”⁷⁴⁶
429. The source of this artificially false number was FORAND⁷⁴⁷ but the origin for false exaggerations was the UNMO assessments. Yet, the Prosecution claimed that the UNMO assessments are “the most comprehensive documented observations” of widespread burning and looting since UNMOs “conducted [a] systematic service to record the damage done to villages throughout Sector South.”⁷⁴⁸ In reality, the facts as presented by the UNMOs do not withstand to scrutiny.
430. There were several versions of assessments prepared at different points in time following Operation Storm, all entitled “Data on Population Left in SS and Destroyed Houses After Operation Storm.”⁷⁴⁹ The initial UNMO assessment is dated 13 September 1995.⁷⁵⁰ The second is dated 4 October 1995,⁷⁵¹ and the final is dated 4 November 1995.⁷⁵²
431. Based on these assessments, the Prosecution maintains that 13,600 out of 18,232 houses, or 73% of the property, had been destroyed by mid-September 1995.⁷⁵³ However, the evidence shows that the UNMO assessments are not credible: (a) the information is contradicted by contemporaneous UNMO Team Daily SitReps, which record an exponentially fewer number of houses damaged; (b) no underlying documents support the number of destroyed houses allegedly recorded; (c) UNMOs did not employ a reliable methodology (not even exiting moving vehicles on various occasions) causing incorrect and inflated counting of damaged properties relative to the total number of

⁷⁴⁶ P-2402,pg.83(Emphasis added); D-1325,pg.5. This same unreliable CHC report also made numerous false allegations of murder for people who were alive long after Operation Storm.

⁷⁴⁷ P-2402,pg.84; Puhovski,T:16108:12-16109:22.

⁷⁴⁸ POS,T:460:20-25.

⁷⁴⁹ P-66; P-98; P-176.

⁷⁵⁰ P-98.

⁷⁵¹ P-66.

⁷⁵² P-176.

⁷⁵³ PTB,paras.40-43; POS,T:460:20-461:20.

properties in the area; (d) UNMOs made no distinction between pre-Operation Storm war damage, collateral war damage, and damage after the conclusion of the military operations; and (e) the 1991 property census reveals that the number of houses the UNMOs claim were destroyed in certain villages is higher than existed in the entire village.

(ii) Major flaws in UNMO assessments and reporting

432. The structure of the UNMO mission in Sector South is critical to understanding why the UNMO assessments are so unreliable.
433. The UNMOs consisted of seven (7) separate teams, known as teams Sibenik, Donji Lapac, Podkonje, Gracac, Zadar-Benkovac, Sinj and Otocac. Each team toured specific areas and then submitted daily team reports to Sector South Headquarters (“UNMO Team Daily SitReps”)⁷⁵⁴ which contained *inter alia* observations of alleged humanitarian rights violations including looting and burning of property.⁷⁵⁵
434. The UNMO Team Daily SitReps were then used as the foundation for the UNMO Sector South Headquarters Daily SitRep to be sent to UNMO Headquarters in Zagreb.⁷⁵⁶
435. The UNMO Sector South Headquarters Daily SitRep did not include all information contained within the UNMO Team Daily SitReps. However, the SMO or in some cases the acting SMO, included the most important information.⁷⁵⁷
436. Collectively, the UNMO Team Daily SitReps provide a contemporaneous account by all seven (7) UNMO Teams. ANTTILA, an UNMO in the Knin office, compiled in one document all the alleged humanitarian violations reported in the UNMO Team Daily SitReps between 7 August and 4

⁷⁵⁴ Anttila, T:2613:13-2616:7.

⁷⁵⁵ Other than the UNMO Team Daily SitReps there was no other formal procedure for UNMOs to collect information on property damage. Marti, T:4702:12-14.

⁷⁵⁶ There are numerous UNMO HQ Daily SitReps from Knin to Zagreb in evidence. See **P-99 through P-170**. However, the Prosecution has not produced any UNMO Team Daily SitReps and, consequently, none are in evidence.

⁷⁵⁷ Anttila, T:2535:19-2536:5.

September.⁷⁵⁸ He titled the document, “Summary of Humanitarian Violations from Headquarters Sector South SitReps between 7 August 1995 and 4 September 1995” (“Summary of Humanitarian Violations”).

437. Based on the UNMO Team Daily SitReps, the Summary of Humanitarian Violations is the most complete compilation of all alleged humanitarian rights observed by all UNMO teams in Sector South between 7 August 1995 and 4 September 1995.⁷⁵⁹
438. However the UNMO assessments, upon which the Prosecution relies, (Exhibits P-98, P-66 and P-176), contain exponentially more alleged damaged houses than the total of damaged houses contained within all the contemporaneous UNMO Team Daily SitReps compiled in the Summary of Humanitarian Violations.⁷⁶⁰ The Prosecution has offered no reasonable explanation for this discrepancy.

(1) No underlying documents support numbers claimed in UNMO assessments

439. In addition to the UNMO Team Daily SitReps, ANTTILA claimed that each UNMO team filled out a separate form specifically identifying the name of a village visited as well as the damaged property and remaining population,⁷⁶¹ and used Exhibit P-65 as an example of the separate form.⁷⁶²
440. It is understandable that P-65 is the sole example of this form⁷⁶³ because MARTI, the other record-keeping UNMO, testified that he saw only a few of these forms. While one team may have actually used these forms, others did

⁷⁵⁸ **P-68; Anttila,T:2535:4-2536:16;2599:17-2600:13.** In compiling **P-68**, Anttila inadvertently included several entries twice, resulting in double counting of certain allegedly observed incidents.

⁷⁵⁹ **Anttila,T:2535:6-2536:16.** The reporting chain of the UNMOs as outlined by Anttila is illustrated by Exhibit **D-171**.

⁷⁶⁰ Even providing the benefit of the doubt and including the occasional double counting of incidents in **P-68**, the quantifiable total of damaged houses in the UNMO Team Daily SitReps from the conclusion of Operation Storm until 4 September 1995 is approximately 740. This number excludes vague references to damaged villages where no actual count was included.

⁷⁶¹ **P-65.** There is no information of alleged humanitarian violations which would have been included in the separate form that would not have also appeared in a Team Daily SitRep. **Marti,T:4703:4-8.**

⁷⁶² **Anttila,T:2530:18-24.** **P-65** is entitled “To the UNMO Humanitarian Rights Section: Village Record in 7CW AOR(Podkonje Team).”

⁷⁶³ **Anttila,T:2660:12-2665:8.**

not.⁷⁶⁴ Further, the only completed form produced in evidence conflicts with the information contained within the UNMO assessment.⁷⁶⁵

441. Regardless of whether the information in P-65 or the UNMO Team Daily SitReps is traced up the UNMO chain, there should have been no disconnect between the numbers of damaged houses reported from the eyes on the ground to the higher levels. However, as revealed at trial, there was a gaping disparity.
442. Because observations purportedly included in P-65 constituted alleged humanitarian violations, all of this information should have also been included in the daily UNMO Team SitReps.⁷⁶⁶ Therefore, regardless of whether a count of damaged houses was made from the P-65 form, or the UNMO Team Daily SitReps, the numbers should have been the same. Since this was clearly not the case, it raises significant questions as to the reliability of the UNMO reports.
443. ANTTILA's first tortured explanation was that the team reports only referenced actively burning houses, whereas the Damage Assessments contained burning and burnt houses.⁷⁶⁷ When confronted with the fact that the documents contradict this position, ANTTILA then claimed that burnt houses were sometimes reported in the team reports, but not routinely.⁷⁶⁸
444. This discrepancy is impossible to resolve because it is unclear what underlying sources of information were used to create the assessments.⁷⁶⁹

⁷⁶⁴ According to Anttila there were voluminous underlying documents provided to the UN in Zagreb. Remarkably, no such documents were provided by the UN. **Anttila, T:2596:2-10; Marti, T:4702:23-4703:3.**

⁷⁶⁵ **Anttila, T:2593:18-2594:13.**

⁷⁶⁶ **Marti, T:4703:4-8.**

⁷⁶⁷ **Anttila, T:2535:4-2535:15; 2603:14-2604:8.**

⁷⁶⁸ **Anttila, T:2605:8-2606:3.**

⁷⁶⁹ Although Anttila primarily claims that forms exemplified by P-65 provided the support for the assessments, he could not exclude for the fact that there could have been other unidentified "sources" of information raising the possibility that the same damaged house could appear multiple times as different houses if it was documented in different reports. **Anttila, T:2530:25-2531:6.** Interestingly, Marti was under the impression that the Team Daily SitReps were the primary source used by Anttila in creating the assessments, although he could also not exclude for the possibility of additional unidentified sources. **Marti, T:4701:17-4702:3.**

(2) UNMO used an unreliable methodology

445. To compound the problem, the UNMO's counting procedures were seriously flawed. The UNMO assessments divided damaged houses into two categories: Totally Damaged and Partially Damaged. Unfortunately, there were no UNMO criteria to determine what type of damage qualified a particular house for a particular category.⁷⁷⁰ Partially damaged houses may have included houses with minor damage such as bullet marks, and houses with a broken door may have been included in either.⁷⁷¹
446. Had there been a consistent criteria used, conducting the damage assessments would have been extremely labor intensive. Per MARTI, each village would have required *at least* half of one day to inspect properly.⁷⁷² However, UNMOs often did not even exit their vehicles to perform the assessments. At one point, MARTI objected to this sloppiness and implored the UNMOs to do a more thorough job.⁷⁷³
447. This unreliability of the statistics is readily apparent from a plain reading of the UNMO assessments. For example, the overwhelming majority of entries are multiples of 5, including 97 percent of the entries for Team Otocac.⁷⁷⁴ Additionally, villages such as Gradac were counted multiple times, and yet were not assessed in the same way each time.⁷⁷⁵
448. Further, eighty-six (86) entries for villages included in the November 1995 UNMO Assessment do not include a total number of structures observed.⁷⁷⁶ This failure means that the total number of 22,213 buildings allegedly observed by UNMOs is incorrect.
449. Significantly, these eighty-six (86) entries account for 867 of the allegedly damaged buildings. As a result, when the UNMO assessments were used as a source for allegations that a significant percentage of the houses in Sector

⁷⁷⁰ P-63; P-176; Marti,T:4698:13-4699:19;4703:25-4704:5; Anttila,T:2617:15-18.

⁷⁷¹ P-63.

⁷⁷² Marti,T:4706:1-6.

⁷⁷³ Marti,T:4705:12-4706:6.

⁷⁷⁴ Anttila,T:2656:10-2657:17.

⁷⁷⁵ Anttila,T:2617:19-2620:24; P-176.

⁷⁷⁶ P-176.

South were damaged after Operation Storm, the calculations were made with an inflated numerator and a depressed denominator resulting in exaggerated and unreliable allegations.⁷⁷⁷

**(3) No distinction between pre and post
Operation Storm damage and
collateral damage**

450. Of the seven UNMO teams, only Teams Sibenik and Sinj reference damage that occurred prior to Operation Storm. Of the one hundred fifty-five (155) villages purportedly observed by these two teams, twenty-six (26) of the villages contained houses damaged prior to Operation Storm, totaling one thousand one hundred fifty-nine (1159) damaged houses.⁷⁷⁸ Nevertheless, these 1159 pre-Operation Storm damaged houses were included in the final total of allegedly damaged houses after Operation Storm.⁷⁷⁹
451. Additionally, while Team Sibenik assessed that the villages of Borjani and Bucic suffered Pre-Storm damage, ANTILLA failed to note these facts on the assessments.⁷⁸⁰
452. It is implausible that the other five (5) teams did not encounter a single house damaged prior to Operation Storm. Either the other five (5) teams just failed to distinguish between pre-Storm and post-Storm damage or ANTILLA simply disregarded their distinctions. This is particularly true of Team Zadar-Benkovac, whose area of responsibility consisted primarily of municipalities with Croatian populations prior to 1991.⁷⁸¹
453. To further compound the problem, the assessments do not distinguish damage from the military operations, *i.e.*, collateral damage, and post-operational damage.⁷⁸² It may also be that the UN personnel were often unable to

⁷⁷⁷ As discussed below, this problem was compounded by the fact that the UNMOs included damage that occurred prior to Operation Storm in the inflated numerator as well.

⁷⁷⁸ **P-176.**

⁷⁷⁹ **Anttila, T:2617:25-2618:18.**

⁷⁸⁰ **P-130; P-176.**

⁷⁸¹ **Anttila, T:2654:8-15.**

⁷⁸² **P-176; P-98; P-66.**

distinguish pre and post operation damage because they were unfamiliar with large areas due to the RSK's extreme ROM before the liberation.⁷⁸³

(4) Official 1991 property census: the number of properties destroyed in certain villages is higher than even existed in the villages

454. In many instances, the UNMOs claim to have viewed more houses in certain villages than existed. According to ANTTILA, when UNMO assessments referenced the number of buildings in a village this meant the number of homesteads. Each homestead may have included more than one physical structure, such as a barn, but would be reflected in the UNMO assessments as a single building.⁷⁸⁴ Thus, the total number of buildings in a village in the UNMO assessments should be relatively equal to the total number of buildings in these same villages contained in the official 1991 Croatian property census.⁷⁸⁵
455. However, a review of the 1991 Croatian property census reflects that in many instances the number of houses the UNMOs claimed had been damaged in certain villages was exponentially higher than the property census noted as existing.⁷⁸⁶
456. For example, in Rodaljice the UNMOs claimed to have systematically counted 701 houses when only 43 existed in 1991.⁷⁸⁷ In Korenica the UNMOs claimed to have systematically counted 3000 houses when only 617 existed in 1991.⁷⁸⁸ In Licki Osik the UNMOs claimed to have systematically counted 2000 houses when only 953 existed in 1991.⁷⁸⁹
457. Additionally, in Licki Osik the UNMOs claimed that 800 houses were damaged, which would be 84% of the village. In contrast to this claim, Licki

⁷⁸³ **Marti,T:4649:23-4650:8;4653:6-13; Berikoff,T:7669:7-15.** In contrast, freedom of movement after Operation Storm was significantly improved. **Roberts,T:6998:16-6999:21; P-218,pg.13.**

⁷⁸⁴ **Anttila,T:2673:24-2674:12.**

⁷⁸⁵ **D-173; D-1411 through D-1421.**

⁷⁸⁶ **D-1324 through D-1327; D-1422 through D-1424.**

⁷⁸⁷ **D-1327; Anttila,T:2621:2-2622:19.**

⁷⁸⁸ **D-1327; D-1324.**

⁷⁸⁹ **D-1327; D-1325.**

Osik was a village of balanced ethnicity that remained largely undamaged after Operation Storm.⁷⁹⁰

(5) The UN did not not rely on the UNMO assessments

458. At this point, it is impossible to discern whether the assessments were pure fabrications designed to create political pressure, or simply seriously flawed documents. However, it is clear is that they do not reflect the facts on the ground. Unsurprisingly, given their unreliability, these assessments were never relied upon at the time by FLYNN, AKASHI or the UN Security Council.
459. Despite the fact UNMO claimed as early as 9 September 1995 that 13,000 houses, or 73% of all houses in Sector South,⁷⁹¹ had been destroyed after Operation Storm, AKASHI never forwarded the UNMO assessments to ANNAN or the Security Council. For example, a report to the UN Security Council on 29 September 1995 noted that UNCRO continued to document instances of destruction of property. However, it is significant that the scale of the burning alleged in the UNMO assessments, although received by AKASHI, was apparently not credible enough to pass on to the Security Council.⁷⁹²
460. AKASHI testified that it was his “duty and... responsibility to keep the Secretary-General and the secretariat fully informed of major developments within the purview of my mandate.”⁷⁹³ Yet, in October 1995 ANNAN had to ask AKASHI about the UNMO assessments due to similar allegations by the Russian delegation.⁷⁹⁴ There is no evidence that AKASHI, or anyone else, referred the UNMO assessments to anyone for further action until ANNAN was prompted by the Russians, and there is no evidence that the UN, including ANNAN, acted on these assessments after receipt.

⁷⁹⁰ Puhovski,T:16115:19-16116:16.

⁷⁹¹ P-97.

⁷⁹² D-1665,para.14.

⁷⁹³ Akashi,T:21621:3-6.

⁷⁹⁴ D-1663; D-1664.

461. In light of all of the evidence, the Trial Chamber should draw an inference that AKASHI and his staff did not find the UNMO assessments credible enough to forward to their superiors for further action. Furthermore, although aware of the UNMOs claims, the Secretary General in his December 1995 report stated that he could only estimate that the number of houses burned in both Sectors North and South was “in excess of 5000.”⁷⁹⁵ Thus even the Secretary General did not rely on the UNMO assessments.
462. By December 1995, the internal Croatian assessment was that there were approximately 1,100 reported cases in both Sectors North and South of “torching and planting explosives.”⁷⁹⁶ This figure corroborates FLYNN’S claim that at least 500 houses had been burned in Sector South by mid September 1995.⁷⁹⁷
463. Accordingly, given the complete unreliability of the evidence presented by the UNMOs, there is no basis for the Trial Chamber to rely on their assessments to prove any element of any charge in the JI.

5. Efforts of Croatian authorities to stop crime

(a) Post-Operation Storm: Restoring Civilian Authority

464. As territory was liberated during Storm, it was immediately returned to the constitutional order of Croatia, with JARNJAK guaranteeing law and order including personal safety and protection of property.⁷⁹⁸ Police stations were immediately re-introduced with personnel from other police administrations added for operational support and assistance.⁷⁹⁹
465. On 4 August, JARNJAK informed a closed session of the Government of Croatia that “the regular police have assumed responsibility for ensuring

⁷⁹⁵ P-477,para.14.

⁷⁹⁶ D-1536,pg.3.

⁷⁹⁷ Flynn,T:1314:4-23; P-20(Flynn),pg.22.

⁷⁹⁸ D-980,pg.2; D-411.

⁷⁹⁹ D-1634(4 August Minutes of the Closed Session of the Government of Croatia); D-1841(Moric),para.8.

public peace and order and for protecting citizens and property in the liberated area.”⁸⁰⁰

466. On 5 August, JARNJAK opened the police station in Gracac and civilian authority was reported to have been reestablished in Knin.⁸⁰¹
467. On 6 August, police administrations were established in Knin and Obrovac.⁸⁰²
468. Pursuant to the Constitutional Law on Ethnic Minorities, ethnic Serbs were appointed as the mayor, the chief of the Kotar Knin Police Administration, and the chief of police in Knin.⁸⁰³
469. On 8 August, the civilian courts were established in Knin.⁸⁰⁴

(b) Gotovina addresses breaches in discipline: Orders and measures for the protection of civilians and civilian property

470. The minor looting described above was in derogation of strict operational orders,⁸⁰⁵ and when GOTOVINA arrived in Knin on 6 August, he was concerned for two primary reasons: first, illegal activity reflected poorly on the reputations of the HV and the Republic of Croatia; and second, disciplinary breakdowns negatively affected combat readiness.⁸⁰⁶
471. As an operational commander, GOTOVINA was well aware that Knin was a significant but intermediate objective and that an army is most vulnerable to a counter-attack after achieving its objective.⁸⁰⁷ Further, GOTOVINA knew that the military campaign was to immediately continue to the borders of Croatia and then into Bosnia-Herzegovina.⁸⁰⁸

⁸⁰⁰ D-1634,pg.2.

⁸⁰¹ D-507; D-1726.

⁸⁰² D-227; D-524.

⁸⁰³ D-836; [REDACTED]

⁸⁰⁴ D-905.

⁸⁰⁵ D-201; P-71,pg.83(“Knin must not experience the same fate as Grahovo. Prevent burning and destruction.”),pg.84(Ordered maximum fairness in treatment of civilians and behaviour toward UN. Passed to all OG and Commanders.”); P-1126.

⁸⁰⁶ D-792; D-970; Jones,T:20918:7-16.

⁸⁰⁷ D-792; D-979, Jones,T:20917:7-20918:1,20947:16-20949:11.

⁸⁰⁸ Jones,T:20943:13-20951:5; D-1635,pgs.2-3.

472. At the 6 August Knin Castle meeting, GOTOVINA voiced his outrage at, and intolerance for, the breaches of discipline and implored members of the SIS and Political Affairs Department, and the MPs, to enforce the code of military discipline.⁸⁰⁹ Additionally, GOTOVINA demanded that war booty be organized and registered.⁸¹⁰
473. The Prosecution claims that, at this meeting, GOTOVINA only took steps to clean up the town in anticipation of TUDJMAN's visit.⁸¹¹ Notably, this claim is inconsistent with the Prosecution's position that GOTOVINA was part of a JCE with TUDJMAN to commit crimes, that he had no genuine intent to implement orders, and that he "repeatedly and persistently" failed to take the necessary and reasonable measures to stop the commission of crimes.⁸¹² There would be no reason to "clean up" Knin in anticipation of TUDJMAN's visit if GOTOVINA and TUDJMAN had agreed to commit the crimes in the first place.
474. No video observer could reasonably conclude that GOTOVINA ordered or approved of the disciplinary breaches he observed. Certainly the MPs, Political Affairs and SIS officers present understood GOTOVINA's message and began taking steps to address the problems.⁸¹³
475. GOTOVINA then explained that the army needed to continue the battle against the Serbian forces, and that control of the town would be handed over that day to other Croatian Government elements at 17.00 hrs.⁸¹⁴
476. The Prosecution claims that on the 6 August video, GOTOVINA issued "no orders to stop the ongoing crime or prevent further crimes, and no measures to ensure the implementation of prior failed orders."⁸¹⁵ The video evidence refutes the Prosecution's claims, because Gotovina:

⁸⁰⁹ **D-792; D-979; P-2159**(Lausic),paras.35-36.

⁸¹⁰ **D-979.**

⁸¹¹ **98bis, T:17444:2-25.**

⁸¹² **98bis, T:17444:2-25.**

⁸¹³ The first reports by these three entities dealing with the problem of crimes committed by members of the HV begin after this meeting in direct response to the urging of GOTOVINA. **P-1133,p.2; P-1134,p.4; P-1270,pg.1.**

⁸¹⁴ **D-979; D-1634.**

⁸¹⁵ **98bis, T:17444:2-11.**

- i. Ordered the army not to be in the streets;
 - ii. Urged the MPs as the “guarantor of the Rules of the Armed Forces” to take action, including by setting up checkpoints and patrolling the town;
 - iii. Urged the Political Affairs department and SIS to take action because “it is not up to a commander after combat to take care of what will become operational in a town.”⁸¹⁶
 - iv. Ordered that the Army was not to enter Knin but was to go around it;⁸¹⁷ and
 - v. Ordered all war booty to be documented and logged.⁸¹⁸
477. The results of GOTOVINA’s orders and anger were visible even to the international observers. Approximately 8 hours after GOTOVINA’s meeting with his commanders, FORAND assessed that a “sense of normalcy” was returning to Knin.⁸¹⁹ By the evening of 6 August, the Croatian civilian institutions assumed control, and civilians began to enter the area.
478. As mentioned previously, the UN personnel reports to the international media the very next day indicated that the Croats were “behaving with discipline and in a correct fashion”⁸²⁰ and that there were no significant breaches of human rights.⁸²¹ FLYNN agreed that there was a sense that the HV soldiers were behaving professionally and in a correct manner, and that “the situation seemed relatively stable and under control.”⁸²²
479. The HV also began to legally collect war booty.⁸²³ Initially, with each unit collecting materials,⁸²⁴ this disorganized process led to further confusion by Sector South observers over the extent of looting.
480. Unfortunately, several HV members did take advantage of this war booty process but the HV military police checkpoints seized “most” of these stolen

⁸¹⁶ D-792; D-979,pg.4.

⁸¹⁷ D-979,pg.3.

⁸¹⁸ D-979,pg.3.

⁸¹⁹ P-352,pg.6.

⁸²⁰ D-63.

⁸²¹ D-64.

⁸²² Flynn,T:1306:6-12.

⁸²³ D-643; D-981; D-208; D-866; D-867.

⁸²⁴ P-1134,pg.4.

items.⁸²⁵ By 10 August, the Zadar MP reported that checkpoints and patrols have resulted in the seizure of “a great number” of mechanical and electronic devices, luxury items, televisions and radios, among other things.⁸²⁶ These seized items were stored in a temporary military police warehouse.⁸²⁷

481. Accordingly, the Prosecution is simply wrong when it claims that GOTOVINA took no steps on 6 August to address the minor looting that was taking place in the town.

(c) Post Operation Storm: Power vacuum and resulting crime wave

482. Immediately after the HV liberated the “Krajina” territory, Croatian civilian authorities took control, and GOTOVINA focused on continued military operations and had no further responsibility for law and order in the region.⁸²⁸
483. Thereafter, the MUP and MPs struggled to stabilize the area as Croatian displaced persons immediately returned, igniting a crime wave which escalated for weeks before slowly coming under control.
484. The primary criminal problem was looting, which brought with it the additional problems of arson and, in some instances, murder.⁸²⁹
485. According to GALOVIC, the Zadar District Public Prosecutor, there were two main categories of looters: criminals taking advantage of the large relatively deserted areas and limited available police resources; and displaced persons who returned to discover that their homes had been looted and/or destroyed. These displaced persons set out to retrieve their property, or to replace lost possessions by looting abandoned homes.⁸³⁰

⁸²⁵ P-1134,pg.4; D-210,pg.2,para.4; D-732; D-868; D-2024 through D-2027; P-112,pg.3; P-976; Bilic,T:19640:11-19641:2; Juric,T:27498:18-27498:25.

⁸²⁶ D-737,pg.9; P-1134,pg.4.

⁸²⁷ D-737,pg.9.

⁸²⁸ D-1634,pg.2; D-1635,pgs.2-3; Jones,T:20943:13-20951:5.

⁸²⁹ Galovic,T:19685:15-21.

⁸³⁰ Galovic,T:19683:17-19684:8; [REDACTED] D-1842,pg.206:26-210:14(Moric Interview) (“In the area that the ‘Storm’ covered we had spontaneous returns of Croats .../inaudible/ of various armed groups, terrorists, remains of the Army.... And in within the territory we had the reserve, Army reserves who used to live in this area We had citizens who would put uniforms on and celebratorily entered the area. And we had people we called ‘heroes after the fact’, after

486. To cover up these crimes, torching of homes and looting were often committed in tandem by the same perpetrators.⁸³¹
487. Sometimes murder was connected to the looting. The most common scenario was a looter coming across an individual in or near the house, and killing the person in the process of looting.⁸³²
488. The crime situation was exacerbated by the desperation and resentment many returnees felt as a result of their own prior victimization.⁸³³
489. The liberated territory bordering Bosnia-Herzegovina posed additional problems as civilians and uniformed individuals infiltrated across the border to loot and burn,⁸³⁴ and even kill.⁸³⁵ This also created a greater opportunity for black marketeers, who may have contributed significantly to the post-Storm crime wave.⁸³⁶
490. In explaining the reasons for crime after Operation Storm, GALOVIC stated as follows:

A: If you want me to answer the question, I have to go back to the beginning, *i.e.*, the year 1991, where, in the area where Operation Storm took place, almost 100 per cent of the Croat population was driven out of, their population [sic] was either looted or destroyed. For a period of four years, these individuals were torn from their previous lives and led a surrogate life, if I can put it that way. They were accommodated in hotels. This was a cause of terrible frustration for them. I can say that generations were destroyed—generations of

everything was finished, all of a sudden they found this courage to put on whatever uniform, put some weapon on it and go through these villages and claim that he liberated this territory. So we had people who would come back to their village and recognise their property in the neighbouring house, so they would put, take that but they wouldn't take it back to their house but would take it back to the house where they used to live, where they lived for the last three years. You had people who would, who took other people's property but said that they recognised, that this is their property that they recognised. So, you have such a huge area, which was impossible to physically control, you had such a situation.").

⁸³¹ Galovic,T:19685:15-21.

⁸³² D-1309; Puhovski,T:15978:17-15979:14; Galovic,T:19698:20-19699:15.

⁸³³ Galovic,T:19726:24-19728:20; Bilic,T:19614:6-19615:5; Marti,T:4638:17-19; Elleby,T:3469:9-3470:5; Malm,T:8183:12-22; Moric,T:25710:6-25711:19; D-810; P-154,pg.4. (UNMO report on house torched by returning neighbor); P-218,pg.4(UNCIVPOL Report referencing poor situation of Croat minority in Sector South).

⁸³⁴ P-148,pg.7; P-114,pg.6.

⁸³⁵ D-1316; P-2402, pgs.27-28.

⁸³⁶ There was a robust black market in the region even prior to Operation Storm when the border was lined with the warring factions as well as the UN. D-1217(Boucher),para.14; P-748,pg.4(30 July Entry); Berikoff,T:7666:20-7667:20.

people were destroyed simply by the fact that they were accommodated and given a life that they were not accustomed to. I'm especially referring to the younger generations here. They led a different sort of life and different sort of customs, and then abruptly they were taken to a new environment. And I'm referring to the rural-urban conflict. This situation did result in the rise of criminality and drug abuse, et cetera, et cetera.

Now, in 1995, when this same area was liberated and these individuals were given the opportunity to go back and see what remained of their earlier lives, if anything, this necessarily resulted in a shock. This prompted a phenomenon which was no longer stoppable. I don't even have to tell you that we have similar situations in natural disasters, such as floods, et cetera.⁸³⁷

(i) **The perpetrators**

491. There were 380,000 displaced Croats living throughout Croatia, some of whom quickly returned to the area.⁸³⁸ Additionally, some civilian looters were from as far away as Switzerland and Germany.⁸³⁹
492. In the ensuing weeks, the UN patrols observed looting often by civilians,⁸⁴⁰ who as one UNMO termed were "shopping without paying."⁸⁴¹
493. Instances of civilians posing as soldiers to loot and burn started as early as 9 August and continued through September.⁸⁴² These civilians may have never been a part of the HV, but, because of the prevalence of military attire could be easily confused with actual HV members.⁸⁴³

⁸³⁷ Galovic,T:19727:1-19728:6.

⁸³⁸ D-1451; P-824,pgs.7,10; Skare-Ozbolt,T:18085:8-18086:25.

⁸³⁹ Marti,T:4638:14-15; P-139,pg.1.

⁸⁴⁰ D-573,para.3; [REDACTED] Many UNMO daily reports include references to crime, such as looting, being committed by civilians who in some cases were armed. See, e.g. D-92,pgs.3-4; P-137,pg.3; P-139,pg.1; P-151,pgs.6-7; P-152,pg.3; P-154,pgs.4-5; P-156,pg.4; P-159,pgs.3-4; P-164,pg.5; P-165,pg.5; P-167,pg.7; Malm,T:8170:2-8171:1, 8179:10-8181:5.

⁸⁴¹ Marti,T:4638:10-13.

⁸⁴² D-1861; P-154,pg.4-5(UNMO report of "soldiers" who locals did not believe were real); Antila,T:2646:3-6; D-426,pg.21("After the army had passed and the war is virtually [over], some fake heroes emerged, who are the most dangerous for Croatia this moment...").

⁸⁴³ Vanderostyne,T:4047:8-11;4079:8-14; Bilic,T:19600:18.

494. As a victim of looting, PW-P69 testified that “they came [from Zadar, Sibenik and Split] in civilian cars. All of them were neighbours. Anyone can put on a uniform.”⁸⁴⁴
495. MARTI acknowledged that civilians wearing military attire made accurate reporting by the UNMOs problematic.⁸⁴⁵ “it was very difficult to identify these looters. Were they civilians or part of an army or whoever they were.”⁸⁴⁶ Consequently, UNMOs were often unable to identify whether criminals were part of a specific military unit.
496. In fact, rarely do any UNMO daily reports actually identify the specific unit for members of the HV seen in the vicinity of criminal activity. This is in stark contrast to the UNMO reports on troop movements, which often included this detail.⁸⁴⁷
497. Crimes committed by demobilized former soldiers compounded the problem. With many having themselves been expelled from the region,⁸⁴⁸ these former soldiers knew the terrain, had access to uniforms, and were well armed with weapons found in the abandoned homes.⁸⁴⁹ This ready access to weapons by demobilized HV personnel presented security problems for Croatia.⁸⁵⁰
498. In some cases, individuals in military uniforms (who may have been deserters, demobilized soldiers or civilians posing as HV) were observed with civilians in the vicinity of criminal activity.⁸⁵¹ To the extent any of these uniformed persons were HV members, the fact that they were not together with a unit and were acting with civilians is a clear indication that this criminal behavior was not part of their military duty.⁸⁵²

⁸⁴⁴ PW-P69,T:2753:19-24.

⁸⁴⁵ P-416(Marti),pg.12; Marti,T:4688:2-4689:2.

⁸⁴⁶ Marti,T:4688:11-12;4618:8-12; Elleby,T:3489:13-3490:2; Malm,T:8169:18-20.

⁸⁴⁷ See, e.g. P-99 through P-170.

⁸⁴⁸ D-1583(Barkovic),para.17; D-1587; D-1588; Bilic,T:19567:23-25.

⁸⁴⁹ Bilic,T:19565:17-19566:13; D-586. Compare D-888(GOTOVINA order addressing same issue); Buhin,T:9942:14-23; [REDACTED] D-890,pg.9.

⁸⁵⁰ D-586; D-890,pg.9; D-1862 through D-1864.

⁸⁵¹ D-589, P-119,pg.6-7; P-140,pg.3; P-150,pg.3; P-160;pg.5; P-223,pg.4.

⁸⁵² Anttila,T:2643:10-22;2646:13-2647:6; P-172(Anttila),pg.5; Elleby,T:3491:12-15;

Bilic,T:19644:11-19645:7. See Section VII.D.1.

(ii) Scale of crime wave

499. The most observable evidence of crime was arson. On 8 August, FLYNN, head of the Human Rights Action Teams (“HRAT”) commented that arson in Sector South became a noticeable problem, and worsened over the next week.⁸⁵³ By about 16 August, approximately 200 houses had been destroyed by fire.⁸⁵⁴
500. The problem was worse in the vast countryside, away from the populated areas housing Croatian civilian authorities.⁸⁵⁵ The burnings peaked in Sector South around 20 August before leveling off and beginning to wind down by the end of the month.⁸⁵⁶
501. During this time, FLYNN organized nightly meetings with all factions of the international community (UNMO, ECMM, UNHCR and ICRC) to formulate a comprehensive view of events in the region.⁸⁵⁷
502. By the end of August, with reports from the international organizations, FLYNN estimated that approximately 500 houses throughout Sector South had been burned.⁸⁵⁸
503. As the Police Coordinator for the Knin-Kotar region, BUHIN testified that “in every hamlet maybe there were one, two, or at most three houses that were torched. There wasn't widespread torching, but even this was too many cases for us.”⁸⁵⁹
504. Contrary to the Prosecution’s allegations that the looting and burning were targeted only against Serb property, Croatian property suffered as well.⁸⁶⁰ Rodaljice, Vuksic, Otavice, Gradac, Vinalic, Krusevo and Krkovic, villages of

⁸⁵³ D-1534,para.7; P-20(Flynn),pgs.13-14; Flynn,T:1311:13-1312:8.

⁸⁵⁴ D-1534,para.7.

⁸⁵⁵ Flynn,T:1312:13-21.

⁸⁵⁶ Flynn,T:1312:12-1313:6; P-20(Flynn),pg.23; P-126,pg.1; P-140,pg.1; P-498.

⁸⁵⁷ P-20(Flynn),pg.6.

⁸⁵⁸ Flynn,T:1314:4-23; P-20(Flynn),pg.22.

⁸⁵⁹ Buhin,T:9966:3-13.

⁸⁶⁰ [REDACTED] P-141,pg.1.

overwhelmingly Croat ethnicity, all suffered from the post Operation Storm crime wave.⁸⁶¹

505. Returning Croatians were likewise victimized, and did what they could to try to deter the criminals by marking their houses as a “Croatian House” in the hopes that they would be spared.⁸⁶² Unfortunately, this was not effective and even marked houses were looted or burned.⁸⁶³
506. One illustration was explained by GALOVIC, who put a sign to deter criminals on his mother-in-law’s home which stated “Ivan Galovic, County State Prosecutor.” Despite the sign and GALOVIC’s position, the sign was torn down and everything in the house was looted.⁸⁶⁴

(iii) Measures to restore law and order

507. As discussed above, employing the Operation Flash model, the MUP, in coordination with the MPs, was responsible for law and order, and was tasked with stabilizing the situation in the liberated territories.⁸⁶⁵ A review of the evidence reflects that GOTOVINA had no role in these matters.
508. After Operation Storm, MORIC and LAUSIC received numerous reports about problems in the liberated area.⁸⁶⁶ They had regular meetings to coordinate their efforts to deal with the crime and continued to issue orders to that effect.⁸⁶⁷ GOTOVINA was not copied on these reports, included in these meetings, nor asked for assistance.
509. Responsible for investigating crimes and securing crime scenes,⁸⁶⁸ the MUP had the authority to detain anyone caught committing a criminal act, including

⁸⁶¹ **D-1327.**

⁸⁶² **Marti,T:4635:24-4636:17;4686:4-16;4687:14-24; P-416(Marti),pg.10; P-123,pg.4.**

⁸⁶³ **Marti,T:4686:17-23(“Yes, it happened that even houses were touched or partly damaged which at the signal before Croatian property or whatever.”); Boucher,T:14047:8-24.**

⁸⁶⁴ **Galovic,T:19684:5-14.** In addition, many of the neighboring houses and even the elementary school were looted. **Galovic,T:19685:3-14.**

⁸⁶⁵ **Moric,T:25818:4-13;25838:10-25839:8.**

⁸⁶⁶ **D-50; D-97; D-1750(Cetina order to subordinates ordering them to produce information about crime, including perpetrators identified as HV); P-498; D-800 through D-802; D-853; D-585.**

⁸⁶⁷ **[REDACTED]**

⁸⁶⁸ **D-899,para.142; D-901.**

members of the military.⁸⁶⁹ Military commanders had no authority over the civilian police.⁸⁷⁰

510. The MUP allocated 3500 officers, many unfamiliar with the territory,⁸⁷¹ to the various police administrations with responsibilities within the newly liberated areas. The Zadar-Knin police administration, covering most of Sector South, was designated to receive 800 of these officers.⁸⁷²
511. At the local level, these MUP officers met regularly with and received reports from UNCIVPOL.⁸⁷³
512. The MPs had approximately 1150 total members available for tasks in the liberated areas.⁸⁷⁴ As explained in Section VII.F.iii(4), LAUSIC sent JURIC to coordinate the efforts by the MPs and to be LAUSIC's "eyes and ears in the field."⁸⁷⁵
513. Throughout the wars in the former Yugoslavia, religious sites were often targets due to the emotional harm their destruction caused.⁸⁷⁶ To combat this, Croatian authorities, including GOTOVINA before the transition of power, made securing religious sites a top priority.⁸⁷⁷ This part of Croatia's post-war effort was successful and the Orthodox Churches remained mostly untouched.⁸⁷⁸

⁸⁶⁹ **D-809; D-510; D-659-D-665; D-809**(Criminal report against soldier for looting); **P-2159**(Lausic),paras.56,59-60; **D-1626**(Bajic),paras.6,14; **D-1532**(Milas),para.68; **Buhin,T:10140:24-10141:11**; [REDACTED] **Cipci,T:23132:1-7; Cetina,T:23478:4-8; D-1868** through **D-1872**(Examples where MUP stops HV members on suspicion of criminal activity); [REDACTED]

D-842(MP report of same incident).

⁸⁷⁰ **D-1841**(Moric),para.9.

⁸⁷¹ **Cipci,T:23118:1-18.**

⁸⁷² **D-1577; D-1778.**

⁸⁷³ **Elleby,T:3386:14-17;3428:12-23.**

⁸⁷⁴ **P-2159**(Lausic),para.177.

⁸⁷⁵ **Lausic,T:15369:20-15370:24;15431:10-15432:9; P-2159**(Lausic),paras.162-166.

⁸⁷⁶ **Flynn,T:1326:7-10; D-1624**,para.30.

⁸⁷⁷ **Flynn,T:1326:14-25;1327:5-20; Liborius,T:8273:16-25.**

⁸⁷⁸ **D-810**,pg.3.

514. Abandoned livestock also presented an opportunity for theft and as this problem escalated, the MUP issued orders to prevent the removal of abandoned livestock.⁸⁷⁹
515. As discussed above, the MUP was aware that the perpetrators included members of the HV and individuals wrongfully wearing HV uniforms.⁸⁸⁰ Regardless of whether the alleged perpetrators were members of the HV or not, the MUP had the authority to stop them.⁸⁸¹ Using this authority, the MUP investigated cases of arson following Operation Storm.⁸⁸²
516. The MUP also established checkpoints throughout the liberated territories that were to be jointly manned with MPs. To assist in this role, MORIC remained in consistent contact with the MP administration, including LAUSIC, regarding checkpoints and patrols.⁸⁸³
517. It would be unreasonable to expect checkpoints to prevent all crime given the limited law enforcement resources, the size of the area, and the ability to evade checkpoints by people familiar with local roads. Nevertheless, checkpoints were instrumental in confiscating stolen property and leading to prosecutions for looting.⁸⁸⁴
518. As of 18 August, the MUP made the tactical decision to prevent future incidents of looting and arson rather than using scarce resources on actively investigating prior instances of misconduct. To proactively prevent future criminal activity, the MUP ordered the chiefs of the police administrations to work with the MPs to set up joint checkpoints and patrols.⁸⁸⁵

⁸⁷⁹ **D-1867**(Report of MUP stopping persons removing cattle and seizing it).

⁸⁸⁰ **D-49.**

⁸⁸¹ **D-508.**

⁸⁸² **P-498; D-1873 through D-1876; D-1883 through D-1888; D-1890 through D-1892.**

⁸⁸³ **Moric,T:25566:25-25567:17;25636:17-23;25731:21-25733:1; D-426,pg.23.**

⁸⁸⁴ **Galovic,T:19687:1-19; Bilic,T:19640:11-19641:2;19637:14-20; D-1861**(9 August report noting civilians in military clothing burning houses and able to circumvent checkpoints); **D-589; D-803 through D-805**(Examples of receipts issued by MUP for items seized at checkpoints);

Moric,T:25714:11-25716:15; [REDACTED] Cipci,T:23129:15-23130:15:7. The limitations of checkpoints are not unique to Croatia. KFOR faced similar problems in stopping civilians from returning to liberated territory because they could not seal off the area from civilians who knew the roads well. **Cross,T:20598:21-20600:19.**

⁸⁸⁵ **Moric,T:25562:25-25563:16;25844:17-25845:2.**

519. [REDACTED]
520. Despite the crime wave, LAUSIC believed that in mid-August the MPs were able to function properly, and fulfill their policing and criminal investigative functions.⁸⁸⁸ However, there were still many challenges in coordinating efforts with the MUP, primarily caused by lack of resources,⁸⁸⁹ a constant concern faced by both the MUP and the MP.
521. The quality of resources was also a problem. For example, some police officers rotating back to their home region were reportedly involved in looting. On 30 August, MORIC ordered all police administrations to take strict measures to curtail such behavior as it undermined the MUP's credibility and negatively affected the criminal justice system.⁸⁹⁰
522. Similarly, to address the lingering problem of HV involvement in crime on 30 August, LAUSIC again issued an order that MP commanders were responsible for crime control and maintaining law and order among the HV, and ordering them to hold regular coordination meetings with the MUP.⁸⁹¹
523. The joint efforts of the MUP and MPs throughout September and October resulted in numerous prosecutions by the military and civilian prosecutors.⁸⁹²
524. Both civilian and military prosecutors maintained authority to open investigations into crimes.⁸⁹³ Either office could act on any information

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D-292.

889

Kardum, T:9251:18-22; 9458:3-22; D-806; [REDACTED]

D-573; D-584; D-575; D-576; D-989; D-589.

890

D-1848; D-1745(Cetina), pg.13 (MUP police officers were prosecuted for looting).

891

D-1072; Lausic, T:15475:20-15477:7.

892

D-595; D-97. The police administration for Zadar-Knin, Sibenik and Split-Dalmatia reported 210 cases of criminal burning investigated; D-1292; P-2189; Lausic, T:15342:3-6; Milas, T:19212:8-19213:2; D-802.

893

Bajic, T:20742:5-16; D-1613(Matulovic).

received, even information from the media.⁸⁹⁴ However, only the civilian legal system was available if the perpetrator was unknown.⁸⁹⁵

525. Jurisdiction over a case was determined by whether the alleged perpetrator was an active member of the military at the time of the indictment, not at the time of the commission of the crime.⁸⁹⁶ Thus, many former HV members were prosecuted by civilian institutions because they were no longer in the HV when the indictment was issued.⁸⁹⁷
526. The civilian prosecutor had general jurisdiction in Croatia. However, if it was established that the offence fell within the scope of work of the military justice system, the procedure would be taken over by the military prosecutor.⁸⁹⁸
527. Croatia's limited resources presented a major challenge in prosecuting crime. After Operation Storm, the civilian prosecutors' workload increased tenfold with no additional resources to assist.⁸⁹⁹ The Zadar County Public Prosecutor's Office had only two lawyers while the Municipal Public Prosecutor's Office had eight lawyers.⁹⁰⁰ Further, there were only three investigative judges available for the newly expanded geographic jurisdiction of the Zadar District Public Prosecutor's Office.⁹⁰¹ The military prosecutors had even fewer resources. There was only one military prosecutor for the Zadar area and one for the Sibenik area.⁹⁰²
528. Because of the connection between looting and the crimes of arson and murder, GALOVIC determined that the best way to achieve control of the situation was to focus the limited prosecutorial resources on looting.⁹⁰³ This approach was pragmatic because arson and murder were more difficult crimes

⁸⁹⁴ **Bajic, T:20742:5-16.**

⁸⁹⁵ **Matulovic, T:20483:10-14.**

⁸⁹⁶ It was the responsibility of the MUP to conduct the investigations into crimes where the perpetrators military identity was not confirmed. **Kardum, T:9467:1-9468:14, 9470:20-9471:1.**

⁸⁹⁷ **Galovic, T:19694:14-19695:24; 19808:12-22; Bajic, T:20748:21-20749:18; Matulovic, T:20483:10-20484:23; D-1618; D-1628**(Rejected military indictment against demobilized soldier).

⁸⁹⁸ **D-1626**(Bajic), paras. 6, 14.

⁸⁹⁹ **Galovic, T:19680:10-19681:24.**

⁹⁰⁰ **Galovic, T:19676:16-19677:4.**

⁹⁰¹ **Galovic, T:19678:11-14; 19730:14-19731:5.**

⁹⁰² **D-1626**(Bajic), para. 13; **Bajic, T:20750:6-23.**

⁹⁰³ GALOVIC's jurisdiction essentially covered all of Sector South. **Galovic, T:19731:18-24.**

to process, especially in the absence of eye witnesses,⁹⁰⁴ so stopping looters was an expeditious way to prevent future incidents of arson and murder.⁹⁰⁵

529. Consistent with this approach, GALOVIC's office instituted proceedings against 309 known perpetrators for robbery and aggravated theft by 19 October. His office also instituted proceedings against nine known perpetrators for murder, two for rape and two for arson by this same time.⁹⁰⁶ By 23 November, the number of cases processed against known perpetrators for robbery and aggravated theft climbed to 705.⁹⁰⁷
530. By the end of February 1996, the number of cases processed by GALOVIC's office for robbery and aggregated theft was 1,277.⁹⁰⁸
531. Although these crimes were not charged as "war crimes" as defined by Croatia law, that is not indicative of a tolerance for criminal activity. Rather, because charging "war crimes" required additional proof that the crime was committed during an "armed conflict" with no increase in maximum sentence, as a practical matter, it did not justify the additional burden on the prosecution.⁹⁰⁹
532. Throughout the relevant period, the military criminal justice system was also functioning in the liberated territories.⁹¹⁰ Along with the civilian courts, the military courts were prosecuting active members of the HV. By January 1996, 63 members of the Split MD were charged with aggravated larceny and 3 members were charged with murder.⁹¹¹
533. According to the statistics of the civilian and MP, for the months of August and September 1995, the MP instituted 485 disciplinary complaints against members of the HV, and filed criminal indictments against 211 HV members. MUP filed additional misdemeanor charges against an additional 123

⁹⁰⁴ Galovic,T:19685:22-19686:25, D-1553(Galovic),pg.11.

⁹⁰⁵ Galovic,T:6-19.

⁹⁰⁶ D-1554, Galovic,T:19692:5-19697:17.

⁹⁰⁷ D-1555, Galovic,T:19698:5-19699:23.

⁹⁰⁸ D-1556; D-1557; Zganjer,T:11649:15-18;11650:13-20; D-511; D-568.

⁹⁰⁹ Galovic,T:19849:4-19852:15; GALOVIC's position was that the armed conflict under Croatian law ceased on 7 August 1995.

⁹¹⁰ D-1621.

⁹¹¹ D-1630.

members of the HV. MUP and the MP together filed an additional 20 indictments against HV members for arson.⁹¹²

534. While all of these efforts to control crime were underway, the responsible entities within the Croatian government never contacted GOTOVINA requesting that he do more to address the problems of looting and burning.⁹¹³

6. No JCE to cover up murder

535. During the Rule 98 *bis* hearing, the Prosecution suggested an alternate JCE to conceal murders by sanitizing bodies without conducting investigations.⁹¹⁴ This theory required participation by all the chiefs of the MUP crime police of the MUP, who had authority to perform criminal investigations.⁹¹⁵

536.

[REDACTED]

537. The Kotar Knin Police Administration encompassed 5000 square kilometers. Due to logistical difficulties, it was not fully operational until several days after Operation Storm.⁹¹⁷ To conduct investigations, it had to rely on the Zadar-Knin Police Administration which itself had only three investigative judges and twelve members of the crime police.⁹¹⁸ These limited resources made it impossible to plan to conduct crime scene investigations for every body sanitized during a military operation as large as Storm.⁹¹⁹

⁹¹² **D-1536**, pgs.2-3; **D-978**.

⁹¹³ **Theunens**, T:13512:2-17,13415:2-9(Acknowledging that there is no record of CERVENKO contacting GOTOVINA about problems with discipline or criminality amongst his troops).

⁹¹⁴ **98bis**, T:17432:2-6. Compare **Albiston**, T:24065:3-25.

⁹¹⁵ **D-1626**(Bajic), paras.6,14.

⁹¹⁶ [REDACTED]

⁹¹⁷ [REDACTED]

⁹¹⁸ **Galovic**, T:19677:5-19678:5; **Kardum**, T:9325:1-9326:6.

⁹¹⁹ **Albitson**, T:24111:21-24115:6; **Buhin**, T:10021:13-20;10153:15-10154:3; **D-1778**; **D-57**.

538. To the extent that more could have been done in spite of the limited resources, the fault lies with the Kotar Knin Police Administration alone and is not indicative of a JCE.⁹²⁰
539. Had there been a Croatian governmental effort to cover up murder through sanitation teams, it would have had to include additional police administrations, including the Sibenik Police Administration, which routinely performed investigations on bodies discovered in the liberated areas and involved the responsible investigative judge and County Prosecutor office.⁹²¹
540. To further undercut this JCE theory, Croatian authorities did investigate and prosecute murders.⁹²² The murder of Dara MILOSEVIC by Veselko BILIC is an illustrative example.
541. BILIC was a refugee from Krkovic, Sibenik Municipality, so he knew the liberated terrain well.⁹²³ BILIC turned his HV weapon in on 18 August⁹²⁴ following his participation in Operation Storm.⁹²⁵ Thereafter, a continuously inebriated BILIC⁹²⁶ misused his uniform as well as confiscated weapons left by the ARSK, to carry out his own patrols⁹²⁷ while routinely evading checkpoints⁹²⁸ until apprehended at a MUP checkpoint on 9 September.⁹²⁹ Approximately 2-3 days prior, BILIC had killed Dara MILOSEVIC.
542. BILIC was initially turned over to the MP because he claimed he was an HV soldier. The MP seized his weapon and began an investigation.⁹³⁰ After

⁹²⁰ [REDACTED] Moric, T:25936:12-22.

⁹²¹ D-1783; D-2158 through D-2168; D-1396; D-1397; D-1398 (reports showing investigative judges called when bodies are found in the Sibenik PA).

⁹²² D-1631 (chart admitted through Bajic with current status of Croatian murder investigations).

With respect to the number of investigations and prosecutions ultimately undertaken by the Croatian government, it is important to note that often there was a lack of witnesses relating to alleged incidents. While the Prosecution has admitted a number of witness statements relating to alleged incidents, these individuals were not made available to Croatian authorities until recently. As a result, it was difficult for the Croatian authorities to investigate and prosecute alleged incidents without evidence.

Bajic, T:20767:14-20768:7; 20771:4-22.

⁹²³ D-1547(Bilic), para.1; Bilic, T:19573:18-22.

⁹²⁴ BILIC was not officially mobilized but joined the effort after finding out about the mobilization. D-1547(Bilic), paras.1-3; Bilic, T:19559:1-9.

⁹²⁵ D-1547(Bilic), para.4.

⁹²⁶ Bilic, T:19567:18-25.

⁹²⁷ Bilic, T:19565:21-19566:13; D-1547(Bilic), para.4.

⁹²⁸ Bilic, T:19573:18-19574:8.

⁹²⁹ P-2562, pg.5; D-1547(Bilic), para.4; D-1549.

⁹³⁰ D-1548; D-1549.

determining that BILIC had been demobilized, and was thus a civilian, the investigation was returned to the MUP crime police in Sibenik who conducted a firearm ballistic analysis and traced the seized weapon to MILOSEVIC's murder.⁹³¹

543. Charged with murder on 6 October, BILIC gave a statement to investigators on 8 October, and was ultimately tried and convicted on 18 January 1996.⁹³²
544. Croatian government actions after the Varivode murders are also germane and instructive.⁹³³ On 28 September, nine bodies were discovered in Varivode.⁹³⁴ This incident promptly seized the attention of the highest levels of the Croatian government. On 5 October, JARNAK and Prime Minister VALENTIC stated during a closed session of the government that such crimes were against everything Croatia stood for, and made it clear the Croatian government was focused on having the Varivode perpetrators discovered and punished.⁹³⁵
545. At the MUP's request, the MUP and the MPs jointly conducted criminal investigations into this and other incidents.⁹³⁶ Additionally, on 6 October the MP in cooperation with MUP officials established OA Varivode to improve the level of security in certain MP zones of responsibility.⁹³⁷
546. These joint investigations involved interviewing persons of interest, collecting additional information, carrying out lie-detector tests, verifying alibis when provided, and ultimately prosecutions.⁹³⁸
547. These actions taken by the responsible authorities within the Croatian government, the MUP and the MP, and without the need for any involvement

⁹³¹ **D-1549; Bilic, T:19565:1-2.**

⁹³² **P-2562; D-1550.**

⁹³³ FC95 through FC103.

⁹³⁴ **D-808.**

⁹³⁵ **D-214; D-215.**

⁹³⁶ **D-800; P-2188/D-801; P-2191; D-1536, pgs.2-3.**

⁹³⁷ **P-2189; Lausic, T:15342:3-6.**

⁹³⁸ **D-802; D-913(Lackovic Patak Police Note: Admits committing the murders at Varivode); D-914 through D-919(Varivode Dossier – contains various MUP police interviews with the suspects); D-1539 through D-1552(Various Official Notes of Interviews by MUP).**

from GOTOVINA, belie the Prosecution's JCE theory of some alternate JCE to conceal murders.⁹³⁹

548. Further, the Prosecution failed to prove that GOTOVINA significantly contributed to this alleged JCE. In vainly grasping for evidence to support its position, the Prosecution points to GOTOVINA's 11 August order forming teams to provide logistical support to the MUP.⁹⁴⁰ This order followed a 5 August HV Main Staff order to provide logistical support to the MUP in the sanitation of the terrain, including construction equipment and security.⁹⁴¹ GOTOVINA's order had no bearing on whether investigations would be conducted. In addition to supporting the removal of animals and human bodies, the order involved miscellaneous clear-up operations including removal of explosives and chemical weapons.⁹⁴² The burial of bodies remained the assignment of the MUP.⁹⁴³
549. There is no evidence to suggest that GOTOVINA knew which police administrations would conduct investigations and which would not. For instance, GOTOVINA's order encompassed areas where MUP criminal investigations were conducted prior to sanitation (Sibenik Police Administration),⁹⁴⁴ while in other areas covered by the same order bodies were often sanitized without first conducting criminal investigations (Kotar Knin Police Administration). In either situation, the evidence is clear that GOTOVINA had no involvement in the MUP decision-making process.

7. No improper detentions of Serbs

550. The Prosecution alleges that ethnic Serbs were transferred to collection centres during and after Operation Storm "to better ensure that they did not return to their settlements."⁹⁴⁵ Serbs in the collection centres are alleged to have been "regularly beaten and forced to work," and then "systematically transferred

⁹³⁹ Kardum,T:9467:1-9468:14,9470:20-9471:1.
⁹⁴⁰ P-496; 98bis,T:17431:1-17432:25.
⁹⁴¹ D-598.
⁹⁴² P-496.
⁹⁴³ D-1575; D-1737(Sruk)para.6; Zidovec,T:19887:11-16.
⁹⁴⁴ D-2158 through D-2168.
⁹⁴⁵ JI,para.31.

out of Croatia.”⁹⁴⁶ The Prosecution’s allegations are contradicted by the overwhelming weight of the evidence.

551. Prior to Operation Storm, the Croatian government established a system whereby RSK residents were to be taken to two different types of centers run by the MUP. Civilians were separated from combatants and taken to “reception centres” operated by the Civil Protection.⁹⁴⁷ This displacement was temporary and carried out in such a manner as to ensure that Serb and Croat civilians returned to their homes as soon as the situation allowed.⁹⁴⁸
552. Contrary to the claim that civilians were “systematically transferred out of Croatia” from the reception centers, civilians were free to leave once they had obtained identity papers and could demonstrate that they would be properly cared for.⁹⁴⁹ FLYNN testified that most of the people in the Knin reception center left and returned home.⁹⁵⁰ An HRAT report of 10 August notes that 130 persons left the Knin reception center after receiving “propusnica.”⁹⁵¹ An internal Croatian government report indicated that as of 7 September, not a single person had been transferred outside of Croatia from a reception center in Knin, Zadar, Sibenik or Split; instead, 687 people had been released to relatives or friends.⁹⁵²
553. In a separate system, potential combatants and prisoners of war were held in collection centers operated by the MUP fundamental police.⁹⁵³ Criminal processing was conducted to determine whether a person was a combatant, had committed a crime including war crimes, or whether the person had other valuable information.⁹⁵⁴ A MUP report of 21 August demonstrates that to ensure due process rights, persons at collection centers were questioned, and then were either brought before an investigative judge or were sent to the reception center for civilians if there was no reasonable suspicion that the

⁹⁴⁶ PTB, paras. 115, 125.

⁹⁴⁷ P-1045; Ilic, T:7579:17-7580:15.

⁹⁴⁸ *Krajisnik*, TJ, para. 725. Approved by *Krajisnik*, AJ, para. 304.

⁹⁴⁹ D-462.

⁹⁵⁰ Flynn, T:1366:2-21.

⁹⁵¹ P-31, p. 1.

⁹⁵² P-2357.

⁹⁵³ P-494.

⁹⁵⁴ P-494; D-509; [REDACTED]

person had committed a crime.⁹⁵⁵ According to Judge MATULOVIC, not a single prisoner under the jurisdiction of the Split Military court was maltreated in any way.⁹⁵⁶

554. International organizations, including the ICRC, had access to the reception and collection centers and reported favorably on conditions, including that prisoners in the collection centres were being released.⁹⁵⁷ The ICRC never relayed any concerns to Croatian officials about the centers after inspection.⁹⁵⁸ Far from being places where people were “beaten and forced to work,” international observers found that the Croatian reception centers had better conditions than those provided in Sector South Headquarters in Knin.⁹⁵⁹ Croatian officials were never informed of any allegation that persons in the reception or collection centers were being beaten, forced to work, or “instilled with fear” so that they would “go to Serbia.”⁹⁶⁰
555. Accordingly, the Prosecution has failed to prove that reception/collection centres were used to persecute and deport Serbs from Croatia.

8. Serbs in the UN camp were not forcibly displaced

556. There is no evidence that Serbs who took refuge in the Sector South Headquarters were deported or forcibly transferred out of Croatia. Although there were some problems at the Sector South facility, those complications were caused by the UN. More specifically, issues arose when, at the request of the ARSK,⁹⁶¹ Sector South personnel violated their mandate by permitting known ARSK soldiers to enter the compound, many carrying weapons,⁹⁶² and transferring injured ARSK soldiers from the Knin Hospital to the Sector South Headquarters.⁹⁶³ In giving safe haven to ARSK combatants, the UN’s actions

⁹⁵⁵

P-909.

⁹⁵⁶

Matulovic,T:20493:12-17.

⁹⁵⁷

D-1666,para.18.

⁹⁵⁸

Zidovec,T:19905:21-25;20018:4-23; **Kardum**,T:9403:3-21; **Matulovic**,T:20505:5-21.

⁹⁵⁹

D-66,pg.3.

⁹⁶⁰

Kardum,T:9501:7-9503:7; **Zidovec**,T:19906:17-19908:20.

⁹⁶¹

P-1092(Novakovic),pg.10.

⁹⁶²

D-271; **D-283**; **Bellerose**,T:5897-5904; **D-514**,pg.2, **Al-Alfi**,T:13920:15-13921:5.

⁹⁶³

P-55(Grubor),paras.3-4.

led to a stalemate with Croatian authorities investigating combatants for war crimes and other crimes against the state.⁹⁶⁴

557. Serbs in Sector South Headquarters expressed a wish to go to Serbia before Storm even finished. On 6 August, ROBERTS informed the press of this desire,⁹⁶⁵ and on 7 August, AKASHI met with the refugees, who “uniformly expressed a desire to leave Croatia.”⁹⁶⁶ Many Croatian representatives tried to convince the Serbs to stay, including Croatian parliamentarians,⁹⁶⁷ SKARE-OZBOLT,⁹⁶⁸ PASIC,⁹⁶⁹ Dr. DODIG,⁹⁷⁰ Dr. LANG and the Catholic bishop.⁹⁷¹ However, their position did not change throughout the month of August.⁹⁷²
558. Refugees insisting on their right to leave Croatia were required to sign a form indicating that their departure was voluntary.⁹⁷³ The Prosecution wrongly claims that Serbs were forced by the Croatian government to sign these forms. Because the Akashi-Sarinic agreement required Croatia to allow the departure of Serbs “who express their desire to do so,”⁹⁷⁴ the UN asked the Serbs to sign the forms. The UN and the ICRC typically wanted to ensure that if they assisted in the *voluntary* departure of civilians, they would not be accused of deportation and forcible transfer.⁹⁷⁵
559. Accordingly, the Prosecution has failed to prove beyond a reasonable doubt that Croatian authorities deported or forcibly transferred Serb civilians from the Sector South Headquarters.

⁹⁶⁴ Matulovic,T:20512:15-23.
⁹⁶⁵ D-1366.
⁹⁶⁶ D-29,pg.3,para.6.
⁹⁶⁷ D-3,pg.3,para.5.
⁹⁶⁸ Skare-Ozbolt,T:18078:14-18079:13.
⁹⁶⁹ D-56,pg.2.
⁹⁷⁰ D-1705(Dodig).
⁹⁷¹ PW-P69,T:2755:15-2756:6.
⁹⁷² D-66,pg.3; D-621.
⁹⁷³ P-56; P-57.
⁹⁷⁴ D-28,para.3; Skare-Ozbolt,T:18103:13-18104:22.
⁹⁷⁵ Skare-Ozbolt,T:18084:6-18085:7; Akashi,T:21631:6-20; Lazarevic,T:17988:1-20; D-1651.

v. **Denial of the right to mass return does not equate to deportation or forcible transfer**

560. The Prosecution maintains that the Croatian government created obstacles to ensure that departed Serbs could not return.⁹⁷⁶ The Prosecution alleges that, as part of a JCE to permanently remove the Serbian civilian population from the “Krajina,” Serb civilians were denied the right to return through plunder and destruction of their property and other discriminatory measures.⁹⁷⁷
561. While most Serbs who departed Croatia had no intention of returning, the Croatian government did not undertake measures to prevent the return of all Serbs, but rather was opposed to their *mass return* until relations normalized with the FRY, a position entirely consistent with international law. Croatia’s position in not allowing mass returns was consistent with that of UNHCR.⁹⁷⁸ In a similar situation, the UN opposed the mass return of Serbs to Kosovo even three years after the conflict ended.⁹⁷⁹
562. Throughout its case, the Prosecution consistently ignored the ongoing hostilities between Croatia and combined Serb forces. The parties stipulated that Croatia was in an armed conflict with the FRY and the RSK from 1991 and throughout the indictment period.⁹⁸⁰ Moreover, residents in the occupied territories of Croatia were not citizens of Croatia, but rather citizens of the RSK and the FRY.⁹⁸¹ Indeed the basic aim of the Serb rebellion was to join the occupied territories with the FRY.⁹⁸² As a result of the Serbian JCE propaganda, people who left did so because *inter alia* they refused to recognize Croatia as their state.⁹⁸³
563. Even in the midst of Operation Storm, “Krajina” Serb combatants and civilians were being integrated into the war machine of Croatia’s enemies, the VRS and the FRY. As early as 7 August, ARSK combatants were transferring

⁹⁷⁶ PTB,para.46.

⁹⁷⁷ PTB,para.116.

⁹⁷⁸ D-690.

⁹⁷⁹ D-691,pg.5.

⁹⁸⁰ *Gotovina Defence Stipulation to Portions of the Prosecution’s Pre-Trial Brief*, 4 February 2010 (“**Stipulation**”).

⁹⁸¹ D-1761; Granic,T:24716:15-24719:23;24677:10-25;24713:19-24714:9;24714:22-24715:8.

⁹⁸² Radic,T:27314:17-25.

⁹⁸³ Granic,T:24669:23-24670:4.

military units, weapons and equipment to the VRS.⁹⁸⁴ Beginning on 11 August, orders were issued to reconstitute ARSK military units and subordinate them to the VRS.⁹⁸⁵ The very next day, the ARSK and VRS launched a counterattack against GOTOVINA's forces in Bosnia, killing many HV troops.⁹⁸⁶

564. The Serbian JCE also organized all able-bodied "Krajina" Serb males in FRY and the RS, and sent them to train for combat not only against the HV in Bosnia and Eastern Slavonia,⁹⁸⁷ but also to "liberate the occupied territories of the 'Krajina.'"⁹⁸⁸ LAZAREVIC witnessed 6000-8000 men being retrained in just one camp.⁹⁸⁹ BABIC confirmed that all able-bodied refugees were to be mobilized into the war effort against the HV and the ABiH.⁹⁹⁰
565. By 2 September, MRKSIC reported to Belgrade that the ARSK General Staff and unit commands in the RS were training for inclusion into the VRS.⁹⁹¹ Two days later, MARTIC issued an order forming the "Krajina Liberation Army."⁹⁹² [REDACTED] On 7 September, MRKSIC implemented MARTIC's order by establishing the "Krajina" Liberation Army, to "reorganize and go back to our areas," and "*we were even prepared to switch to sabotage and terrorist, I mean anti-sabotage actions reconnaissance and so on.*"⁹⁹⁴
566. To further complicate Serb return issues, the evacuating RSK authorities took birth records, which made it very difficult to determine eligibility for Croatian citizenship.⁹⁹⁵ Many records were not returned until 2003.⁹⁹⁶ Moreover,

⁹⁸⁴ [REDACTED] D-259,pg.2; D-828,pg.7. At least 80% of the ARSK's materiel and ammunition was transferred to the VRS. D-923,pg.11.

⁹⁸⁵ D-259,pg.2.

⁹⁸⁶ Stipulation,para.107; D-983,pg.3; D-1978,pg.6.

⁹⁸⁷ D-259,pg.3; D-1461(Lazarevic),pgs.30-31; Lazarevic,T:17980:15-17982:25; D-415; D-1469.

⁹⁸⁸ D-259,pg.4; [REDACTED]

⁹⁸⁹ Lazarevic,T:17983:1-17983:10.

⁹⁹⁰ D-1736,pg.130,lns.18-22;pg.131,lns.2-25; P-2156,pg.4.

⁹⁹¹ D-1523.

⁹⁹² D-416.

⁹⁹³ [REDACTED]

⁹⁹⁴ D-1524; Mrksic,T:18988:7-16(Emphasis added); D-1524.

⁹⁹⁵ D-938.

⁹⁹⁶ D-686; D-687.

because Croatia had no diplomatic relations with the FRY or the RS, there were no consular offices to process citizenship requests.⁹⁹⁷

567. While not allowing “mass return,” Croatia did permit individual returns on humanitarian grounds.⁹⁹⁸ This was not Croatia’s “private” policy, but rather was the official policy as articulated to the European Union.⁹⁹⁹ By October 1995, the ECMM reported that 100 Serbs had returned to Knin from Serbia.¹⁰⁰⁰
568. Moreover, Croatia was under no obligation under international law to allow the return of Serbs who had opted to leave Croatia in favor of joining the enemy (FRY, RSK and RS). FRY-RSK citizens who had taken up arms against Croatia, or had chosen to leave Croatia to join family members who had taken up arms against Croatia, did not have a right under international law to return.¹⁰⁰¹ Aware of this body of law, TUDJMAN often referred to such persons as “optanci,” or persons who had “opted out” of Croatia.¹⁰⁰²
569. Furthermore, belligerents may even expel enemy nationals during armed conflict. Although “no one shall be arbitrarily deprived of the right to enter his own country,”¹⁰⁰³ international law recognizes the right of a state to impose restrictions on freedom of movement to protect national security, to expel enemy aliens, and to deny their return until at least the conclusion of hostilities.
570. Although Serb civilians left as a result of evacuation orders during a lawful military operation, because of their joint FRY-RSK citizenship, Croatia would have been within its sovereign rights to expel any enemy aliens, or persons who otherwise did not at least pledge their allegiance to the Republic of Croatia. *Oppenheim’s International Law* states that in customary law:

⁹⁹⁷ **Granic,T:24802:1-19.**

⁹⁹⁸ **Granic,T:24781:20-24782:17;24802:1-19; D-1818.**

⁹⁹⁹ **D-1821; Granic,T:24808:4-23; [REDACTED]**

¹⁰⁰⁰ **P-824,pg.8; P-822.**

¹⁰⁰¹ *Eritrea Ethiopia Claims Commission, Partial Award, Civilians Claims, Eritrea’s Claims 15, 16, 23 & 27-32, 17 December 2004, para.82 (“EECC”)*

¹⁰⁰² **P-444(Galbraith),para.33; Galbraith,T:4945:16-17; Radic,T:27315:19-27316:7.**

¹⁰⁰³ Article 12(4) of the International Covenant on Civil and Political Rights

The right of states to expel aliens is generally recognized. It matters not whether the alien is on a temporary visit or has settled down for professional, business or other purposes on its territory, having established his domicile there. ... Theory and practice correctly make a distinction between expulsion in time of hostilities and in time of peace. *A belligerent may consider it convenient to expel all hostile nationals residing, or temporarily staying, within its territory: although such a measure may be very hard on individual aliens, it is generally accepted that such expulsion is justifiable.*¹⁰⁰⁴

571. This view is supported by the jurisprudence of international tribunals such as the Eritrea-Ethiopia Claims Commission. In a case alleging the expulsion of Eritrean nationals (including dual Eritrean-Ethiopian nationals) from Ethiopia during the 1998-2000 Eritrea-Ethiopia armed conflict, the Commission found that “[i]nternational humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict”¹⁰⁰⁵ and concluded that even citizens with dual-nationality can be expelled where they hold the citizenship of the opposing belligerent State.¹⁰⁰⁶
572. Thus, even though Croatia was not responsible for the expulsion of Serb civilians from the “Krajina,” it was not under an obligation to allow their immediate or unconditional return.
573. In any event, as late as March 1996 (before normalization of relations with the FRY) RSK leaders like BABIC continued to oppose the individual Serb return and argued instead that “collective return” would allow “Krajina” Serbs to regain the territory and seek political autonomy.¹⁰⁰⁷

¹⁰⁰⁴ OPPENHEIM’S INTERNATIONAL LAW, Vol. 1, § 413, pgs. 940–941 (Sir Robert Jennings & Sir Arthur Watts eds., 1996) (“**Oppenheim**”) (Emphasis added).

¹⁰⁰⁵ **EECC**, para.82. *See also* fn. 27; Karl Doehring, Aliens, Expulsion and Deportation, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* pg. 16(1985) (“[A] State may nonetheless be justified in expelling such a group without regard to the individual behaviour of its members, if the security and existence of the expelling State would otherwise be seriously endangered, for example . . . during a state of war.”); GERALD DRAPER, *THE RED CROSS CONVENTIONS* pgs. 36–37(1958), quoted in *10 DIGEST OF INTERNATIONAL LAW* pg. 274(Marjorie Whiteman ed., 1968)(citing “the customary right of a state to expel all enemy aliens at the outset of a conflict”); *HANDBOOK OF HUMANITARIAN LAW*, supra note 15, at § 589(5), pg. 287(forced “repatriation [of nationals of an enemy state] must be considered as permissible”); McNAIR & WATTS, supra note 23, at pg. 76 (“There is no rule which requires a belligerent to allow enemy subjects to remain in his territory and he is entitled to expel them if he chooses”); Geneva Convention IV, Art.35 does not explicitly address expulsion of nationals of the enemy state or other aliens, instead emphasizing the right of aliens who wish to leave the territory of a belligerent to do so.

¹⁰⁰⁶ **EECC**, paras.55,82.

¹⁰⁰⁷ **D-1610**, pgs.2-3.

574. As part of the obstacle to return, the Prosecution argues that the passage of laws like the *Temporary Takeover of Property Law* amounted to complete property confiscation which prevented Serbs from coming back to Croatia. This narrow view is simply not supported by the evidence, and completely discounts the circumstances under which Croatian authorities were operating in the wake of Operation Storm.
575. At the outset, it must be understood that in August 1995, TUDJMAN expected that no more than 10% would wish to return to Croatia.¹⁰⁰⁸ He was not alone. HOLBROOKE believed that “most of them [Serbs] will not return,” but TUDJMAN should “tell them to return, give them compensation.”¹⁰⁰⁹ GALBRAITH noted that at most 20% of the Serbs would want to return.¹⁰¹⁰
576. Even under GALBRAITH’s more optimistic 20% estimate, the housing and personal property of 80% of the Serbs had been abandoned by its owners with no intention of returning. For security reasons alone, it was entirely reasonable to enact the *Temporary Takeover of Property Law* in response to this massive abandonment of property.¹⁰¹¹ At a private session of the Croatian government, Prime Minister VALENTIC articulated that the law was a response to the ongoing anarchy in the liberated areas. By moving people into the abandoned properties, it was hoped that the property would be saved from arson and looting.¹⁰¹² Furthermore, to reduce the financial drain on Croatian governmental resources, TUDJMAN wanted housing for the 380,000 refugees and displaced persons sheltered in Croatian coastal hotels.¹⁰¹³
577. With the war still ongoing, Croatia also had valid security concerns in abandoned areas. This was especially acute in areas neighboring the RS¹⁰¹⁴ as the Serbian JCE was preparing for the “liberation” of the RSK.¹⁰¹⁵

¹⁰⁰⁸ P-449,pg.9; Granic,T:24763:9-15.

¹⁰⁰⁹ P-449,pg.9.

¹⁰¹⁰ P-458,pg.46.

¹⁰¹¹ P-476; D-422; P-475.

¹⁰¹² D-426,pg.21; Radic,T:27140:19-27141:4; D-1911(Bagic),pg.3; D-427.

¹⁰¹³ D-1451; P-824,pgs.7,10.

¹⁰¹⁴ Skare-Ozbolt,T:18159:2-19.

¹⁰¹⁵ P-463, Radic,T:27181:2-11.

578. The Prosecution also alleges that Croatia attempted to colonize the “Krajina” to prevent the return of Serbs. First, a country cannot colonize its own sovereign territory. Second, most observers believed in August 1995 that the overwhelming majority of Serbs did not wish to return to Croatia. This group included TUDJMAN, HOLBROOKE, GALBRAITH, and AKASHI.¹⁰¹⁶ In this light, there was no reason to construct plans to block the return of people who did not wish to return.
579. Third, in support of its “colonization” argument, the Prosecution relies on a transcript of a conversation between RADIC and TUDJMAN on 22 August to argue that Croatia wanted “no more than 10%” of Serbs to return to Croatia. At trial, RADIC explained that this conversation concerned a very specific piece of territory where Croatia is at its narrowest, and therefore there was a security threat that Croatia could be cut in two.¹⁰¹⁷ The discussion was not about preventing the return of Serbs, but rather about increasing the number of Croats in that area, by amongst other things “establish[ing] some kind of a city sooner or later.”¹⁰¹⁸
580. Fourth, on 23 August TUDJMAN confirmed in a private conversation that the intention of moving Croats into the area was not to change the ethnic demographics of the area:

*[T]oday it is not so much a matter of changing of the kind of population as of populating certain places, certain areas. This means if you put large commands, training institutions and so on, in certain places, dozens and hundreds of people will go there who will have to have families and so on, and immediately the situation, the life, and so on, will be different.*¹⁰¹⁹

581. In review of the foregoing, it is beyond any doubt that after Operation Storm, the abandoned Serb property presented security concerns both because of criminals and because large abandoned tracts bordered the RS. This problem was enhanced by the need to move displaced Croats out of hotels on the Dalmatian coast. The passage of the *Temporary Takeover of Property Law*

¹⁰¹⁶ P-449,pg.9; P-458,pg.46; D-29,pg.3,para.6.

¹⁰¹⁷ Radic,T:27134:1-10;27181:2-9.

¹⁰¹⁸ P-463,pg.10; Radic,T:27192:18-27193:1.

¹⁰¹⁹ P-464,pg.2(Emphasis added).

was an entirely reasonable measure to alleviate some of these compelling concerns.

582. Accordingly, since the Defence's interpretation of Croatia's post-Storm policies is certainly a "reasonable interpretation other than the guilt of the Accused," the Prosecution has failed to meet its burden of proof.

VI. Gotovina did not participate in or contribute to a JCE by failing to act

A. Prosecution's allegations

583. As set forth above, there is no basis for inference that Croatian State policy amounted to a JCE either to commit unlawful shelling and mass-expulsion, or to burn and loot Serb property. Without a JCE, GOTOVINA's alleged participation or contribution becomes irrelevant. Nonetheless, this section demonstrates that even if *ex hypothesi* a JCE was established, the Prosecution has still failed to prove that GOTOVINA participated or contributed thereto, in particular through an alleged failure to intervene against crimes committed by his subordinates.
584. The Prosecution claims that GOTOVINA participated and contributed to the alleged JCE through (1) unlawful shelling; (2) providing assistance to the human sanitation teams "in order to bury murder victims without investigating the cause of death,"¹⁰²⁰ (3) his Security Plan order for "collecting and transporting the population trapped in liberated territory to collection centres: a) from the right axis to the Livno sports hall; b) from the left axis to the sports hall of the SSC in Sinj town,"¹⁰²¹ which allegedly "demonstrates GOTOVINA's intent to get the population out of their homes, rather than to protect their property,"¹⁰²² and (4) his failure to take necessary and reasonable measures against crimes by his subordinates.
585. None of these four elements can be supported by the evidence: (1) the allegations of unlawful shelling directed against civilians are wholly without merit,¹⁰²³ (2) the allegations of an intention to cover up murders by providing

¹⁰²⁰ **98bis,T:17432:2-7.**

¹⁰²¹ **P-1126.**

¹⁰²² **98bis,T:17431:23-24.**

¹⁰²³ *See* Section V.D.i.

logistical support to sanitation efforts is not the only reasonable inference to be taken for the evidence,¹⁰²⁴ and (3) anticipatory orders to protect civilians “trapped” in a combat zone does not establish an intention to harm civilians or their property.¹⁰²⁵

586. With respect to his alleged JCE participation set forth in (4), the Prosecution maintains that GOTOVINA’s alleged failure to take necessary and reasonable measures to prevent or punish crime by his subordinates was so flagrant that – beyond command responsibility under Article 7(3) – the Trial Chamber should conclude that he *intended* to give his subordinates “free reign to loot and burn and even kill with impunity in furtherance of the objective of forcibly removing the Serbian population from the Krajina,” giving rise to JCE liability under Article 7(1).¹⁰²⁶ Contrary to these assertions, the evidence demonstrates that GOTOVINA took necessary and reasonable measures to prevent and punish crimes by his subordinates, such that this fourth element also fails to establish any JCE liability on his part.
587. The Prosecution apparently relies on GOTOVINA’s alleged failure to act both to infer that he had the requisite *mens rea* of the JCE and to also establish the requisite material element of a “significant contribution” to the commission of crimes. There is considerable evidentiary overlap between necessary and reasonable measures as an element respectively of JCE liability and command responsibility. An exhaustive consideration of the facts in this regard is set forth in the following Chapter on Article 7(3) liability. This section will therefore address only the most salient aspects of the evidence in light of a JCE theory of liability.

B. Gotovina took necessary and reasonable measures and did not deliberately fail to act to support or encourage crimes by subordinates

588. The failure to act as a basis for JCE liability must be distinguished from liability under a theory of command responsibility. As a general principle, regarding Article 7(1) liability, the *Galic* Trial Judgment stated:

¹⁰²⁴ See Section V.D.iv.6.
¹⁰²⁵ **Lausic,T:13395:13-13396:5.**
¹⁰²⁶ **98bis,T:17433:4-7;17444:15-19.**

a superior may be found responsible under Article 7(1) where the superior's conduct had a positive effect in bringing about the commission of crimes by his or her subordinates, provided the *mens rea* requirements for Article 7(1) responsibility are met. Under Article 7(3) ... the subordinate perpetrator is not required to be supported in his conduct, or to be aware that the superior officer knew of the criminal conduct in question or that the superior did not intend to investigate or punish the conduct. More generally, there is no requirement of any form of active contribution or positive encouragement, explicit or implicit, as between superior and subordinate, and no requirement of awareness by the subordinate of the superior's disposition, for superior liability to arise under Article 7(3). Where, however, the conduct of the superior supports the commission of crimes by subordinates through any form of active contribution or passive encouragement (stretching from forms of ordering through instigation to aiding and abetting, by action or inaction amounting to facilitation), the superior's liability may be brought under Article 7(1) if the necessary *mens rea* is a part of the superior's conduct. In such cases the subordinate will most likely be aware of the superior's support or encouragement, although that is not strictly necessary.¹⁰²⁷

589. With respect to JCE liability, the Appeals Chamber in the *Krajišnik Case* recognized that “the failure to take effective measures to prevent recurrence of the expanded crimes could constitute one of the factors to take into account in determining whether the evidence showed that the JCE members accepted an expansion of the criminal means to realize the common objective.”¹⁰²⁸ It thus considered “failure to intervene as one of the elements tending to prove Krajišnik’s acceptance of certain crimes” within the JCE.¹⁰²⁹
590. Conversely, if GOTOVINA took necessary and reasonable measures against crimes by his subordinates, this would tend to prove that there was no “acceptance of crimes” on his part. Failure to act cannot *ipso facto* give rise to JCE liability.¹⁰³⁰ The Prosecution must prove that GOTOVINA failed to act with the intent to further the common criminal objective¹⁰³¹ and that this constituted a “significant contribution” to the commission of large-scale crimes.¹⁰³²

¹⁰²⁷ *Galic*, TJ, para.169.

¹⁰²⁸ *Krajišnik*, AJ, para.193.

¹⁰²⁹ *Krajišnik*, AJ, para.194.

¹⁰³⁰ *Galic*, AJ, para.175; *Mrksic*, AJ, para.49; *Oric*, AJ, para.43.

¹⁰³¹ *Krajišnik*, AJ, para.173; *Tadic*, AJ, para.229.

¹⁰³² *Krajišnik*, AJ, para.215.

591. Against this exacting legal standard, there is no possible reasonable conclusion that GOTOVINA deliberately failed to act as part of a JCE. As set forth more fully in the following Chapter on command responsibility, GOTOVINA took numerous measures before, during, and after Operation Storm, to prevent and punish crime. By way of summary, these measures included the following:
- a. identifying the lack of a professional NCO corps as a major weakness in the rapidly developing Croatian Army and establishing a training center to address this shortcoming;
 - b. ensuring training of subordinates in humanitarian law including proper treatment of civilians and POWs;
 - c. issuing orders prior to Operation Storm to respect humanitarian law, including specifically to prevent plunder and destruction of property and ensure humane treatment of civilians and POWs;
 - d. removing a subordinate commander prior to Operation Storm in the wake of undisciplined conduct by the members of some units in Operation Summer-95;
 - e. utilizing the established system and procedures to address discipline breaches and criminal acts by soldiers;
 - f. exhorting and demanding that subordinate commanders and agencies not under his command, including the MP, SIS and Political Affairs, ensure that soldiers engaging in criminal behavior be held accountable;
 - g. issuing orders during and after the conclusion of Operation Storm to address concerns specifically brought to his attention relating to criminal behavior by some members of subordinate units;
 - h. encouraging disciplinary actions and prosecutions of soldiers by the proper elements of the established system; and

- i. demobilizing units whose commanders did not have effective control sufficient to implement GOTOVINA's orders not to burn and loot.¹⁰³³
592. These measures are contrary to any reasonable inference that GOTOVINA not only failed to act, but that he did so with the intention to support and encourage his subordinates to commit crimes in furtherance of a JCE. This alone is sufficient to demonstrate that the Prosecution theory in this regard is wholly untenable. However, an examination of the other evidence that has been offered further confirms that there is no basis whatsoever for attribution of liability to GOTOVINA.
593. Notwithstanding the measures adopted by GOTOVINA, the Prosecution claims that GOTOVINA's intent to further the JCE through deliberate failure to act is evident from his alleged efforts to "justify" the crimes being committed. The Prosecution's claims are gross misrepresentations of GOTOVINA's comments to international officials.
594. The Prosecution claims that in a meeting with FORAND on 5 September, GOTOVINA "justified" the ongoing crimes.¹⁰³⁴ On the contrary, the SitReps of that day reflect that the main discussion was the Croatian position that the UN was harboring dozens of individuals who had committed crimes.¹⁰³⁵ From GOTOVINA's perspective, the UN was preventing the Croatian courts from prosecuting and punishing these individuals. A reasonable explanation of the evidence is that GOTOVINA's alleged comments about revenge in response to Serb actions in 1991 was in relation to the need for the criminals being harbored by the UN to face judgment in the Croatian court system. The comments had nothing to do with a discussion of burning and looting which, as evidenced by the contemporaneous UN reports, was never discussed.¹⁰³⁶
595. The Prosecution also implies that GOTOVINA threatened to have ROBERTS executed at this meeting because ROBERTS was reporting negatively about

¹⁰³³ For a full discussion on each point, *see* Chapter VII.
¹⁰³⁴ **98bis, T:17584:2-10.**
¹⁰³⁵ **P-383; P-384.**
¹⁰³⁶ **P-383; P-384.**

ongoing crime.¹⁰³⁷ First, GOTOVINA did not threaten to kill ROBERTS, but rather to have him tried as a spy.¹⁰³⁸ Moreover, GOTOVINA's hostility toward ROBERTS is explained above and predates Storm.¹⁰³⁹ The Trial Chamber must conclude that there is a "reasonable explanation" of GOTOVINA's hostility to ROBERTS other than that he wanted him killed because of his reporting about crime.

596. The Prosecution also cites a letter from GOTOVINA to CERVENKO in which he states that the "conduct of members of the Split MD does not conflict with state policy," as implying that GOTOVINA believed burning and looting were consistent with state policy. On the contrary, a review of CERVENKO's original letter to GOTOVINA reveals that GOTOVINA was merely responding to CERVENKO's assertion that mistreatment of UNCRO members was "in direct opposition to state policy."¹⁰⁴⁰
597. With respect to the 19 September meeting with ECMM representatives, the Prosecution claims that GOTOVINA "impliedly condoned the crimes of his subordinates, in furtherance of the JCE" when he allegedly stated that he "regarded it as a human feeling to hate an enemy who has burned, looted and expelled one's family."¹⁰⁴¹ The Prosecution takes this sentence out of context to justify its position that GOTOVINA had the specific intent not to implement his orders to prevent and punish crimes.¹⁰⁴²
598. The 20 September report notes that GOTOVINA's opinion regarding burning, looting and harassment was that the police had to control the situation and that since Croatia was a nation of law and order, any person committing crimes will be charged.¹⁰⁴³ Moreover, ECMM monitor MARKER-HANSEN, who attended the meeting, testified that it was his understanding that if a soldier or

¹⁰³⁷ POS,T:483:8-16.
¹⁰³⁸ P-803(Liborius),para.13; P-407,pg.1; D-710; Roberts,T:7058:15-7059:12.
¹⁰³⁹ See Section IV.B.ii.
¹⁰⁴⁰ D-1538.
¹⁰⁴¹ 98bis,T:17431:8-16.
¹⁰⁴² 98bis,T:17584:21-17585:10.
¹⁰⁴³ P-895.

a civilian was engaged in such criminal behavior, GOTOVINA wanted them charged with a crime.¹⁰⁴⁴

599. A reasonable explanation of the evidence relating to the 19 September meeting with ECMM officials is that GOTOVINA expected—and wanted—the police to investigate and charge anyone engaged in criminal activities, regardless of their military status. The fact that GOTOVINA also believed that these criminals were motivated by revenge is a self-evident truth that in no way suggested that the motive justified the crime.

C. Gotovina’s remoteness from the crimes of his subordinates

600. As set forth in the following Chapter involving Article 7(3) issues, GOTOVINA was the highest-ranking military commander in the Split MD with 30,000 troops under his command. Most of the evidence fails to establish that those responsible for the post-combat crime wave were actually his subordinates. Nonetheless, to the extent that his subordinates may have committed some crimes, there can be no basis for JCE liability because of the remoteness between GOTOVINA’s alleged failure to act and the commission of crimes.
601. Although there is no requirement of an agreement between the accused and the principal perpetrator of crimes, the Appeals Chamber observed “it is inappropriate to impose [JCE] liability on an accused where the link between him or her and those who physically perpetrated the crimes for which he or she is charged is too tenuous.”¹⁰⁴⁵ The Prosecution has offered no evidence to establish that the link between GOTOVINA and his lowest-ranking subordinates is not too “tenuous” to be a basis for JCE liability.
602. Against the applicable law and evidence, there can be no doubt that the Prosecution has failed to prove that there is no reasonable interpretation of the facts other than that GOTOVINA consciously intended not to prevent or punish crimes committed by subordinates in furtherance of a JCE. Accordingly, GOTOVINA must be acquitted of this charge.

¹⁰⁴⁴ *Marker-Hansen*, T:14929:15-18.

¹⁰⁴⁵ *Brdanin*, AJ, para.418

VII. Gotovina has no criminal responsibility pursuant to Article 7(3)

A. Introduction

603. The Prosecution alleges that GOTOVINA is criminally liable pursuant to Article 7(3) of the Statute. In light of the numerous orders, reprimands, disciplinary measures and other steps taken by GOTOVINA to prevent and punish crime, and in light of his extremely limited role in maintaining law and order after Operation Storm, there is no basis for the conclusion that there is “no reasonable interpretation of the evidence” other than that GOTOVINA made no “genuine effort” to prevent or punish crimes among members of the Split MD under his command and control.
604. Therefore, the Trial Chamber must acquit GOTOVINA of all charges based on command responsibility pursuant to Article 7(3).

B. Prosecution’s allegation

605. The Prosecution charges that GOTOVINA is criminally responsible for the criminal acts or omissions of his subordinates which he failed to prevent or punish.¹⁰⁴⁶ Specifically, the Prosecution argues that GOTOVINA had no “genuine intent”¹⁰⁴⁷ to prevent or punish crime because he allegedly failed to do the following:
- a. Remove from deployment in Operation Storm the 4GBr and 7GBr, GOTOVINA’s only professional brigades, after certain members of those brigades were involved in looting and burning in Operation Summer-95;¹⁰⁴⁸
 - b. Remove from deployment the 3rd Battalion, 126th Regiment, because certain numbers were Croatian victims of Serbian ethnic cleansing from the “Krajina” area and thus more likely to engage in retributive and illegal activity;¹⁰⁴⁹

¹⁰⁴⁶ **JL**,para.46.

¹⁰⁴⁷ **98bis**,T:17444:13.

¹⁰⁴⁸ **PTB**,para.55; **Jones**,T:21039:19-21040:1,21042:6-21043:6.

¹⁰⁴⁹ **PTB**,para.56.

- c. Request that the launch of Operation Storm be delayed to allow for more professional training of HV soldiers;¹⁰⁵⁰
 - d. Investigate allegations of crimes using the MP or others at his disposal;¹⁰⁵¹
 - e. Notify appropriate military and civilian prosecution authorities, such as the Military Prosecutor's Office, of crimes and results of any investigation; and
 - f. Impose immediate disciplinary measures or disciplinary sentences on suspected subordinates to prevent further crimes.¹⁰⁵²
606. As an operational commander, GOTOVINA understood that upon reintegration of the occupied territories into the Croatian constitutional order, other government agencies had been tasked with establishing law and order. He was neither the commander of occupying forces in a foreign country, nor in charge of governing the newly liberated territories. Notwithstanding his limited powers, GOTOVINA took all necessary and reasonable measures available prior to, during, and after Operation Storm to address possible involvement by his subordinates in burning and looting. Contrary to the Prosecution's allegations, GOTOVINA received no notice of unlawful killings, cruel treatment or inhumane acts allegedly committed by his subordinates.¹⁰⁵³
607. In short, GOTOVINA took numerous measures from which the Trial Chamber can conclude that a "reasonable explanation of the evidence" is that GOTOVINA made "genuine efforts" to prevent and punish crime. These measures include *inter alia* the following:
- a. identifying the lack of a professional NCO corps as a major weakness in the rapidly developing Croatian Army;

¹⁰⁵⁰ Jones,T:21041:10-18.

¹⁰⁵¹ Jones,T:21013:20-21014:19;21019:1-21020:18; D-281.

¹⁰⁵² PTB,para.67.

¹⁰⁵³ PTB,para.57.

- b. establishing a training center for NCOs;
- c. ensuring training of subordinates in humanitarian law including proper treatment of civilians and POWs;
- d. issuing orders prior to Operation Storm to respect humanitarian law, including specifically to prevent plunder and destruction of property and ensure humane treatment of civilians and POWs;
- e. removing a subordinate commander prior to Operation Storm following undisciplined behaviour by some members of subordinate units in Operation Summer-95;
- f. utilizing the established system and procedures to address discipline breaches and criminal acts by soldiers;
- g. exhorting and demanding that subordinate commanders and agencies not under his command, including the MP, SIS, and Political Affairs, ensure that soldiers engaging in criminal behavior be held accountable;
- h. issuing orders during and after the conclusion of Operation Storm to address concerns specifically brought to his attention relating to criminal behavior by some members of subordinate units; and
- i. encouraging disciplinary actions and prosecutions of soldiers by the proper elements of the established system.

608. The Prosecution has chosen to ignore: (a) GOTOVINA's consistent efforts to prevent and punish crimes; (b) that he did not have command and control of the MPs with respect to criminal investigations; and (c) that he presided over a significant increase in disciplinary measures within the Split MD following Operation Storm. Furthermore, the Prosecution has not submitted evidence of specific further measures GOTOVINA could have taken which were so

obvious under the circumstances that his failure to take those measures proves that he had “no genuine intent to prevent or punish crime.”

C. Applicable law

609. To attribute criminal responsibility under Art. 7(3), the Prosecution must prove:

- a. a superior-subordinate relationship existed between the accused and the direct perpetrators;
- b. the accused knew or had reason to know that a criminal act was about to be, was being, or had been committed by such subordinates; and
- c. the accused failed to take the necessary and reasonable measures to prevent or punish.¹⁰⁵⁴

610. Each element must be established beyond a reasonable doubt with the Trial Chamber satisfied that “there is no reasonable explanation of the evidence other than the guilt of the accused.”¹⁰⁵⁵

D. Superior-subordinate relationship: Gotovina lacked command or effective control over perpetrators

1. The Prosecution has in most cases failed to establish that crimes were committed by Gotovina’s subordinates

611. A fundamental requirement is proof that the crimes for which GOTOVINA is charged were committed by soldiers in his chain of command. Although the Prosecution need not identify each individual perpetrator, it must at least establish that the individual who perpetrated the crime was within a group or unit under the effective control of GOTOVINA.¹⁰⁵⁶

612. Although in a limited number of cases the Prosecution has established that some incidents of burning and looting were committed by HV soldiers, in the overwhelming majority of incidents, the Prosecution has failed to establish that the perpetrators of murders, arson, and looting were either HV soldiers or subordinates of GOTOVINA.

¹⁰⁵⁴ *Halilovic*,AJ,para.59;*Oric*,AJ,para.18;*Kordic*,AJ,paras.827,839;*Blaskic*,AJ,para.69.

¹⁰⁵⁵ *Martic*,AJ,para.61;*Halilovic*,AJ,para.109.

¹⁰⁵⁶ *Oric*,TJ,para.311.

613. The mere fact that some perpetrators were seen wearing military uniforms is insufficient to establish that they were subordinates of GOTOVINA. The Trial Chamber has heard ample evidence that the use of military uniforms by civilians and demobilized soldiers was prevalent.¹⁰⁵⁷ Therefore, this factor alone is insufficient to establish a superior-subordinate relationship.

2. Gotovina had no effective control of perpetrators

614. In the very few cases where involvement of GOTOVINA's subordinates in criminal activity has been established, there is insufficient proof that he had effective control over such perpetrators. Despite attempts to prevent crime, a number of buildings were destroyed either in part or completely by rogue soldiers, mostly by Homeguards conscripts who were refugees exacting revenge.¹⁰⁵⁸
615. To establish the existence of a superior-subordinate relationship, the Prosecution must prove that the superior had effective control¹⁰⁵⁹ over the subordinate in question,¹⁰⁶⁰ *i.e.*, the material ability to prevent or punish the subordinate's criminal conduct.¹⁰⁶¹ This requires more than just "substantial influence" over subordinates.¹⁰⁶²
616. The possession of *de jure* power may not suffice for a finding of superior responsibility if it does not manifest itself in effective control.¹⁰⁶³ The *Oric* Appeals Judgment held that "[t]he possession of *de jure* authority, without more, provides only some evidence of such effective control."¹⁰⁶⁴ Proof is required that the superior was not only able to issue orders but that his orders were actually followed.¹⁰⁶⁵ Effective control may not exist in the context of

¹⁰⁵⁷ **Bajic**, T:20734:1-23; **P-2159**(Lausic), para.49; **D-1842**(Moric), pg.207; [REDACTED]
¹⁰⁵⁸ **Marti**, T:4688:6-25; **Buhin**, T:11414:20-24.
¹⁰⁵⁹ **D-810**, p.3.
¹⁰⁶⁰ **Oric**, AJ, para.20.
¹⁰⁶¹ **Halilovic**, AJ, para.59; **Celebici**, AJ, para.303.
¹⁰⁶² **Oric**, AJ, para.20; **Halilovic**, AJ, para.59; **Celebici**, AJ, para.256.
¹⁰⁶³ **Celebici**, AJ, para.266; **Hadzihanovic**, TJ, para.80; **Halilovic**, TC, para.59.
¹⁰⁶⁴ **Halilovic**, AJ, para.204; **Celebici**, AJ, para.197; **Popovic**, TJ, para.1038; **Blagojevic**, AJ, para.302.
¹⁰⁶⁵ **Oric**, AJ, para.92; **Hadzihanovic**, AJ, para.21; **Celebici**, AJ, para.197; **Popovic**, TJ, para.1038.
Strugar, AJ, paras.254,256; **Halilovic**, AJ, para.207; **Blaskic**, AJ, para.69; **Popovic**, TJ, para.1038.

undisciplined conscripts who do not follow orders of a superior.¹⁰⁶⁶ This is particularly relevant to Croatia, which had to establish its armed forces in the wake of “ethnic cleansing,” the occupation of a third of its territory, and to confront – with very limited time and resources – the serious military threat posed by the Serbian JCE.

617. Whether a superior actually has effective control is a matter to be determined by the evidence.¹⁰⁶⁷ It is apparent that despite GOTOVINA’s efforts to train an army of professional soldiers, there was limited discipline among some subordinate units, especially conscripts that included IDPs from the “Krajina.”

3. Gotovina’s relationship to subordinate perpetrators was too remote to have effective control

618. The *Orić* Appeals Chamber held:

Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate. The separate question of whether – *due to proximity or remoteness of control* – the superior indeed possessed effective control is a matter of evidence, not of substantive law.¹⁰⁶⁸

619. The *High Command* Case held:

The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means co-extensive. Modern war such as the last war, entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality

¹⁰⁶⁶ *Strugar*,AJ,para.257(“instances of indiscipline and of non-compliance with orders would be clearly relevant to an assessment of whether Strugar had effective control over his subordinates”); *Halilovic*,AJ,para.207.

¹⁰⁶⁷ *Celebici*,AJ,para.206; *Aleksovski*,AJ,paras.73-74; *Popovic*,TJ,para.1038.

¹⁰⁶⁸ *Orić*,AJ,para.20(Emphasis added); *Halilovic*,AJ,para.59; *Blaskic*,AJ,para.217; *Hadzihasanovic*,TJ,para.99.

does not attach to every individual in this chain of command from that fact alone.¹⁰⁶⁹

620. GOTOVINA was the highest ranking commander in the Split MD. As such, there would have been at least six levels of command between him and the average HV soldier.¹⁰⁷⁰ The Prosecution has failed to establish that any commanders were involved in commission of crimes.
621. There is evidence that some incidents of burning and looting were committed by regular and reserve soldiers of the Split MD, as well as soldiers of units attached to the Split MD. GOTOVINA did not have effective control over soldiers six levels below him, in terms of his "material ability to prevent or punish their misdeeds." This is the primary job of the commanders at the scene.
622. The ICRC Commentary to Article 87 of Additional Protocol I makes clear that humanitarian law makes a distinction between the commander at the highest levels and the immediate commander of the perpetrator:

This responsibility primarily applies with respect to "members of the armed forces under their command" [I]t is self-evident that the obligation applies in the context of the responsibilities as they have devolved over different levels of the hierarchy, and that the duties of a non-commissioned officer are not identical to those of a battalion commander, and the duties of the latter are not identical to those of a divisional commander. Within the confines of these areas of competence, the responsibility of each of these applies with respect to all the members of the armed forces under his command.¹⁰⁷¹

623. During the negotiating process of Articles 86-87 of Additional Protocol I, the U.S. representative observed:

Such measures [as are required of a superior] would differ at different levels of command. For example, a senior commander might meet his responsibilities by designating a member of his staff to establish programmes for disseminating the Conventions and Protocol I, and to receive periodic reports on the status of such programmes. At lower

¹⁰⁶⁹ 11 *Trials of War Criminals Before the Nuremberg Tribunal Under Control Council Law No. 10, Nuremberg*, Oct.1946-Nov.1949 (1951) ("**High Command**"),pg.543.

¹⁰⁷⁰ These would have included the squad, platoon, company, battalion and brigade commanders.

¹⁰⁷¹ **ICRC Commentary**, para.3554; Guenael Mettraux, *The Law of Command Responsibility*, Oxford University Press, pg.151 fn.62 ("**Mettraux**"); *Kordic*,TJ, para. 411.

levels commanders would have more direct responsibilities for ensuring that persons under their command received adequate instruction and had sufficient knowledge of their responsibilities to be able to implement them effectively.¹⁰⁷²

624. GOTOVINA was in exactly the situation contemplated by the ICRC Commentary concerning the correspondence between the scope of responsibility and differing levels in the military hierarchy. As the highest ranking commander in Split MD, GOTOVINA's duties did not include monitoring the specific discipline and sanctions being imposed by lower level commanders. BOTTERI testified that GOTOVINA would only receive information about specific disciplinary actions taken by brigade commanders and commanders of independent battalions. For levels below that, GOTOVINA would only receive statistical information.¹⁰⁷³ BARKOVIC testified that a commander is expected to monitor his own level of command and two levels below him.¹⁰⁷⁴
625. GOTOVINA did not have the material ability to punish the crimes of low-level perpetrators.

4. The chain of command was not functioning adequately

626. Where the Prosecution alleges that a high-level commander exercised effective control over a low-level perpetrator through a series of subordinate commanders, the Prosecution must establish that each commander in the chain of command possessed effective control over his subordinate commander, ultimately leading to the perpetrator.¹⁰⁷⁵
627. Evidence of GOTOVINA's lack of effective control is apparent because he had to issue multiple orders over several days, both written and oral, prohibiting undisciplined conduct. The Prosecution alleges that GOTOVINA issued orders without intending to implement them. To the contrary, the evidence proves that he had to issue multiple orders, and impose discipline by excoriating subordinate commanders and other measures, because there was a

¹⁰⁷² Mettraux, pg.151, fn.62.

¹⁰⁷³ D-878(Botteri), para.7.

¹⁰⁷⁴ Barkovic, T:20186:17-20.

¹⁰⁷⁵ Mettraux, p.152, fn.64; Blaskic, AJ, para.67; Halilovic, AJ, para.210.

breakdown in the chain of command which inhibited GOTOVINA's material ability to prevent crimes.

628. The inadequacies in the chain of command were a constant problem in the HV. This was due to several objective factors, including the rapid establishment of the HV in response to dire wartime circumstances resulting from the aggression of the Serbian JCE.

(a) Gotovina told ECMM officials after Storm that he lacked control due to insufficient NCO corps

629. When asked by ECMM representatives on 27 October why there were problems with some HV soldiers committing crime, GOTOVINA explained his lack of effective control over the perpetrators:

Asked about lessons learned in OPS STORM: both positive and negative; the latter being the lack of control with "undisciplined soldiers of non-professional units doing extraordinary things." The General stated that the HV lacked and still lack the level of skilled NCOs and medium level commanders able to control the soldiers.¹⁰⁷⁶

630. GOTOVINA was not making excuses to the ECMM, as evidenced from his internal reports within his chain of command, where GOTOVINA drew attention to the lack of professional NCOs and attempted to address the problem.¹⁰⁷⁷

631. When war in Croatia began in 1991, the Croatian Armed Forces consisted mostly of self-organized volunteers. In time, the HV was created, but the ability to effectively train HV officers and soldiers was impacted by the constant state of war and the following uneasy truce between 1991 and 1995.¹⁰⁷⁸

632. In an effort to quickly create a professional army the HV General Staff opened an officer's center, which became the Croatia Military Academy.¹⁰⁷⁹ However, with the critical shortage of trained officers, HV members with even limited military education were immediately shifted to higher levels in the

¹⁰⁷⁶ P-822.
¹⁰⁷⁷ D-1596.
¹⁰⁷⁸ D-1633,para.26.
¹⁰⁷⁹ D-1583(Barkovic),paras.3-4,11.

chain of command. The result was a significant lack of officers and NCOs at the lower levels of command.¹⁰⁸⁰

633. When GOTOVINA became the Split MD commander, the HV was far from a mature professional army, although steps were being taken to improve its quality.¹⁰⁸¹ From his prior French Foreign Legion experience, he was aware that in both professional and Homeguards brigades, the HV had a critical lack of NCOs, crucial to the maintenance of discipline, combat readiness, and combat effectiveness.¹⁰⁸²
634. In the face of the grave and imminent peril of the Serbian JCE's occupation of and military threat against Croatia, the HV did not have the many years needed to fully develop a proper NCO corps. GOTOVINA nonetheless took steps to address this deficit.¹⁰⁸³ He established a Split MD training center in Sepurine to include NCO training.¹⁰⁸⁴ He also raised this issue numerous times with his superiors to push the HV, as a whole, to address the lack of skilled NCOs.¹⁰⁸⁵
635. Essentially, the poor quality of the NCO corps led to a lack of effective control over elements of the lowest levels of the HV. While the Prosecution makes the unsubstantiated assertion that GOTOVINA's concern with poorly trained NCOs is an attempt to excuse criminal behavior, military witnesses consistently advised the Chamber that GOTOVINA was correct: the lack of qualified NCOs can have a crippling effect on discipline within the ranks, regardless of the best intentions of the commanders at the highest levels.¹⁰⁸⁶
636. BAJIC testified that "to some extent" looting was accepted within HV units.¹⁰⁸⁷ LAUSIC explained why the lack of skilled NCOs resulted in this phenomenon:

¹⁰⁸⁰ **D-1583**(Barkovic),para.5

¹⁰⁸¹ **D-1583**(Barkovic),paras.4-25.

¹⁰⁸² **D-1633**,paras.25-27; **D-1578**(Herrick),paras.7,11; **D-1583**(Barkovic),paras.18-22;

Barkovic,T:20159:13-20; 20174:13-20176:1; **Liborius**,T:8354:2-16.

¹⁰⁸³ **Herrick**,T:20105:2-20107:2

¹⁰⁸⁴ **D-1583**(Barkovic),para.19.

¹⁰⁸⁵ **D-1596**; **D-1604**.

¹⁰⁸⁶ **Jones**,T:20939:14-20940:11,20940:14-20941:13; **D-1633**,para.25; **D-1578**(Herrick),para.7.

¹⁰⁸⁷ **Bajic**,T:20823:9-20.

I believe that at the lower command levels in the Croatian army, and when I say that, I mean primarily non-commissioned officers and lower-ranking officers, there was a rather tolerant attitude towards a lack of discipline among the troops. However, this tolerant attitude did not arise from -- and I'm convinced that did not arise from any orders, but, rather, that as individuals, they hailed from the same body of people over whom they were in command at that moment, and against the principles of professionalism, they instilled emotions into their decision-making process. They did that to empathize in a way with perpetrators of illegal actions as people who could not avoid the traps of their own frustrations, the traps of their own emotions as those who had suffered in the war and who had been persecuted during the war.¹⁰⁸⁸

637. Without experienced NCOs, GOTOVINA lacked the material ability to prevent or punish perpetrators of crime in the lowest ranks of the HV.

(b) 10,000 troops had to be rapidly mobilized on the eve of Operation Storm

638. In order for the Split MD to be able to carry out operations during Storm while simultaneously fighting against VRS forces in Bosnia, 10,000 soldiers had to be mobilized on the eve of Storm.¹⁰⁸⁹ Moreover the number of troops belonging to the Split MD increased from 12,700 on 17 July 1995¹⁰⁹⁰ to 30,000 on 4 August.¹⁰⁹¹
639. Because Homeguard units had only recently been mobilized, it was difficult for unit commanders to exercise effective control. An 18 August inspection of Split MD by the Main Staff reported that Homeguard units had communications problems and that, “changes of command personnel in reserve units that were demobilised for a long period of time, and commands and command personnel only recognize the real state within the units when in combat.”¹⁰⁹²
640. Croatia recognized that the mobilization of so many men on the eve of Storm was required by imperative military necessity. It was thus exceedingly difficult for GOTOVINA to exercise effective control (in terms of the material

¹⁰⁸⁸ Lausic,T:15686:6-25
¹⁰⁸⁹ P-2585,pg.6.
¹⁰⁹⁰ D-534,pg.35.
¹⁰⁹¹ P-2585,pg.6.
¹⁰⁹² D-891,pg.3.

ability to prevent or punish), when almost 60% of the troops under his *de jure* command had not even been mobilized HV members three weeks prior to Storm.

(c) An example of breakdown in chain of command

641. An 18 August SIS report reveals the root of the problem with the conscript units was a lack of effective control: “the situation is the worst in the 134th Homeguard Regiment . . . the line of command within the unit is not functioning, the commander lacks the necessary authority to implement orders issued by OG WEST, members of the unit are continuously destroying and burning residential buildings within the AOR.”¹⁰⁹³ The AOR of the 134th at the time can be seen in Appendix B.
642. The SIS report advised that the way to improve the functioning of the line of command was to propose “a reduction in the number of units and members in the units.”¹⁰⁹⁴ The Split MD and the OG West commander agreed, and immediately set out to demobilize all those who through their misconduct were impeding the ability of commanders to exercise effective control over units.¹⁰⁹⁵
643. A “reasonable interpretation of the evidence” is that GOTOVINA’s chain of command made genuine efforts to try to discipline subordinates not under effective control through demobilization. This denied undisciplined troops their livelihoods. Due to the dire economic circumstances at the time, membership in the HV was for many men their only means of obtaining a salary, social security, and health insurance.¹⁰⁹⁶

(d) Prosecution’s reliance on Gotovina’s satisfaction with command and control is misplaced

644. In attempting to establish that GOTOVINA had effective control over perpetrators, the Prosecution relies on reports submitted by GOTOVINA after

¹⁰⁹³ D-984,pg.2.

¹⁰⁹⁴ D-984,pg.2.

¹⁰⁹⁵ P-71,pg.116; D-650; D-651; D-653; D-884; D-885; D-886.

¹⁰⁹⁶ P-2159(Lausic),para.191; D-878(Botteri),para.10.

Storm in which he reported that command and control was “at the required level.”¹⁰⁹⁷ The Prosecution’s reliance on these reports is misplaced.

645. GOTOVINA’s assessment of the command and control was relative to the circumstances in which he found himself. In rejecting the Prosecution’s interpretation of these reports, BARKOVIC explained:

The fact of the matter is that General GOTOVINA and all the other officer[sic], including the Main Staff of the armed forces were full[sic] aware of the state of the armed forces. Therefore, the expectations matched the actual state of affair when it come[sic] to the armed forces and not against an ideal situation, where everything has been achieved. So I suppose that the satisfaction is based on what could be expected of an army organised as it was. It was impossible for the army to be fully manned by trained officers and NCOs.¹⁰⁹⁸

646. Accordingly, in light of the objective circumstances, GOTOVINA did not have the material ability to prevent or punish low-level perpetrators given that the chain of command was not adequately functioning.

5. Gotovina lacked effective control because he was operationally removed from security issues in the liberated areas

(a) The scope of authority of operational commanders

647. The scope of GOTOVINA’s effective control is based on his role as an operational commander. In particular, upon the liberation of the occupied territory, authority to maintain law and order was immediately transferred to State institutions. The fact that GOTOVINA was on top of the HV chain of command does not mean that his duties and responsibilities consisted of the sum of all duties and responsibilities of those officers or state officials who stood in the chain of command between him and the perpetrators.¹⁰⁹⁹
648. The *High Command* case is instructive in assessing GOTOVINA’s effective control. The Tribunal, in assessing the charges against Wilhelm von Leeb during the period when he was Commander-in-Chief of Army Group North, addressed the command structure:

¹⁰⁹⁷ P-1132,pg.7; P-2585,pg.14.

¹⁰⁹⁸ Barkovic,T:20201:21-20202:22.

¹⁰⁹⁹ *High Command*,pgs.543-4,554-555; *Halilovic*,AJ,para.214.

Executive power at the beginning of the Russian campaign was conferred directly upon the army commanders and the commanders of the army group rear areas. It was provided, however, that the commander in chief of an army group might issue orders to his subordinates in the field of executive power. In other words, his authority in this field was more in the nature of a right to intervene than a direct responsibility.

* * * *

. . . As stated, his function was operational. Many administrative duties had been left to his subordinate armies and his army group rear area. He and his staff alike would have the right to assume that the commanders entrusted with such administrative functions would see to their proper execution. Under such conditions it must be accepted that certain details of activities within the sphere of his subordinates would not be brought to his attention.¹¹⁰⁰

649. The Appeals Chamber in *Halilovic* similarly confirmed that “criminal responsibility does not attach to a military official merely on the basis of his ‘over-all command.’”¹¹⁰¹ A mere “right to intervene” does not trigger criminal responsibility.¹¹⁰² Operational commanders engaged in the conduct of hostilities cannot therefore be said, in general, to exercise the same degree of authority as commanders administering occupied territory: “[t]he authority of [an occupational] commander is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally.”¹¹⁰³ Thus, “[while] commanders of occupied territories may be held responsible on the basis of the doctrine of superior responsibility in circumstances where the link of subordination is limited and very general...[t]his clearly does not apply to commanders in general.”¹¹⁰⁴

¹¹⁰⁰ *High Command*, pgs.554-555; *Halilovic*, A.J., para.212.

¹¹⁰¹ *Halilovic*, A.J., para.214.

¹¹⁰² *Halilovic*, A.J., para.212(citing *High Command*).

¹¹⁰³ *Celebici*, A.J., para.258; *Hadzihasanovic*, T.J., para.81: “While the authority of a commander in occupied territory is territorial, the authority of one in unoccupied territory is limited to the soldiers under his command Tribunal case law does not hold a commander in unoccupied territory responsible for crimes committed in his area of responsibility.”

¹¹⁰⁴ *Kordic*, T.J., para.412(citing *Celebici*, A.J., para.258).

(b) Gotovina was an operational commander in Bosnia and was not operationally tasked with providing security in the liberated areas

650. As commander of joint HV-HVO Croatian Forces since 1994, GOTOVINA was an operational commander who was conducting military operations in Bosnia for most of 1995. GOTOVINA, as the commander of the Split MD, led numerous operations (Winter 94, Jump 1, Jump 2, Summer-95, Storm, Maestral and Southern Move) as part of an overall campaign to defeat the forces of the Serbian JCE.¹¹⁰⁵ Throughout 1995, GOTOVINA also had the duties of an occupying commander in Bosnia. It is unreasonable to expect GOTOVINA to be both an occupying commander in Bosnia, and in charge of complex combat operations in Croatia and Bosnia, and to be further responsible for law and order in newly liberated territories in Croatia.¹¹⁰⁶ He was thus entitled to rely on others in Croatia to take care of those responsibilities.
651. As explained herein, the evidence is overwhelming that prior to Storm, the operational responsibility of maintaining law and order in the liberated areas among civilians and soldiers was given to LAUSIC and MORIC.¹¹⁰⁷ Neither GOTOVINA nor anyone else in the military chain of command was invited to their meetings or requested to implement the plans that they had established. As Judge ORIE noted in an exchange with Major General CROSS, as is true for most things in life, you do not “plan a job without involving those who have to do the job.”¹¹⁰⁸
652. The reason that GOTOVINA was not burdened with security obligations was because he was assigned primary responsibility for implementing the Croatian Forces military campaigns in Bosnia and Croatia. Lt. General JONES, an expert with 36 years of military experience, including ten (10) years as a senior officer, and the only expert witness who was a battle-field commander, described the role of the operational commander and the battle focus the commander must maintain. In his expert report and his testimony he focused

¹¹⁰⁵ **D-728; D-1633**, paras.30,33-34.

¹¹⁰⁶ See Section IV.C.

¹¹⁰⁷ See Sections V.D.iv.5(a), V.D.iv.5(c)(iii) and VII.F.

¹¹⁰⁸ **Cross, T:20617:6-8.**

on leadership of forces, preparation for offensive operations, and how the order process is employed to effectuate the commander's intent.¹¹⁰⁹

653. As discussed, GOTOVINA's mission was not limited to the defeat of enemy forces in the "Krajina" and the liberation of Knin. Upon achieving that intermediate objective, GOTOVINA was immediately tasked with preparing for further large-scale operations jointly with the HVO and ABiH in Bosnia.¹¹¹⁰
654. GOTOVINA was never mentioned in the context of stabilization of the liberated territories following Operation Storm,¹¹¹¹ and consistent with military doctrine for an operational commander he was never involved in any pre- or post-operation stabilization planning.¹¹¹²
655. As an operational commander, GOTOVINA's responsibility was to look forward and plan for the continuation of his military campaign.¹¹¹³ To that end, on 9 August 1995, as the offensive reached Croatia's international border, GOTOVINA issued an order for Active Defense.¹¹¹⁴
656. However, shortly thereafter, on 12 August the VRS attacked, killing fourteen HV soldiers in Derala.¹¹¹⁵ For GOTOVINA, this continued fighting necessitated increased troop movements, orders to repel the counterattack, and ROM in combat areas,¹¹¹⁶ while he was also planning the next offensive known as Operation Maestral.
657. It is without dispute that following Operation Storm, GOTOVINA's primary focus¹¹¹⁷ was and had to be the continued military campaign in Bosnia,

¹¹⁰⁹ **D-1633**, paras.1-3,14-24,Ex.1; **Jones,T**:20893:25-20894:16,20896:5-20898:21,20905:9-20906:22.

¹¹¹⁰ **D1635; D296.**

¹¹¹¹ **D-1471**(Skare-Ozbolt),para.10; **Deverell,T**:24211:1-4.

¹¹¹² **Cross,T**:20591:13-20592:15; **Deverell,T**:24194:23-24195:25,24196:21-24197:9; 24197:16-20,24198:17-23; **Jones,T**:20909:6-20910:15;20911:3-17;20912:8-10;20914:10-20915:7,20952:3-20954:5;21012:21-21013:19; **D-979; D-1635; D-296; D-1633**,para.21; **D-1634; P-359**,pg.3; **D-1633**,para.20.

¹¹¹³ **Jones,T**:20915:1-7;20952:3-20954:5; **Deverell,T**:24201:4-16,24211:20-24212:11.

¹¹¹⁴ **D-281; Jones,T**:20918:17-20919:19.

¹¹¹⁵ **D-983; D-1978.**

¹¹¹⁶ **P-1131; P-1143; P-1116**,pg.51(1993 Law on Defence provides HV Commander authority to restrict movement only in area of combat operations or where combat operations are being prepared).

¹¹¹⁷ **Jones,T**:21044:17-21045:13.

leading both Operations Maestral and Southern Move.¹¹¹⁸ The defeat of the combined Serb forces depended on that focus.

658. The Prosecution points to an order of 23 August 1995 and argues that GOTOVINA was providing security for the Freedom Train and thus could have issued orders for security in the area.¹¹¹⁹ A review of the evidence demonstrates that GOTOVINA did not protect the Freedom Train on his own initiative, but rather pursuant to an order from the HV Main Staff. This proves nothing more than that GOTOVINA was implementing a specific order from his superiors with respect to a specific assignment. It does not establish that GOTOVINA had effective control beyond his regular duties as set forth above.
659. It is wholly unreasonable to expect of any commander to conduct large-scale combat operations against a formidable adversary in a foreign country where he is also an occupying commander, and to then argue that he cannot be allowed to rely on other State institutions to maintain law and order along with discipline in liberated territory in Croatia.

(c) Gotovina justifiably relied on the Political Affairs, SIS and MP to ensure military discipline while he was engaged in combat

660. To assist in ensuring military discipline, GOTOVINA justifiably relied on three professional services that were subordinated to their respective Department Chiefs in Zagreb: the Political Affairs,¹¹²⁰ SIS¹¹²¹ and MP. The duties of each were: Political Affairs was to prevent crime;¹¹²² SIS was to monitor (“spy”) within units;¹¹²³ and the MP was to investigate and begin disciplinary and criminal proceedings. All three services were to coordinate their activities during Storm.¹¹²⁴

¹¹¹⁸ D-728; D-1633, para.33.
¹¹¹⁹ 98bis, T:17443:13-17444:1; D-773.
¹¹²⁰ P-1113, pgs.99,252.
¹¹²¹ P-1113, pg.101.
¹¹²² D-810, pg.3.
¹¹²³ P-1113, pg.101; D-984, pg.2.
¹¹²⁴ D-810; P-918.

661. GOTOVINA made clear at the Knin meeting on 6 August who was responsible:

We are now faced with the next problem we have. That is all those structures, the others, the remaining structures, the logistics, political activity, security, MP and everybody else that follows an army in an offensive, that is which automatically protects the army during the offensive. That step ahead and step behind. And automatically these structures assume everything that remains to be solved, in order for everything to be in order, militarily in total order, completely solved. *And the guarantee for military culture and for the military reputation of an army is her Political Activity. Security Service, Military Police. And you are the most responsible people here for all this mess that we have here.*¹¹²⁵

662. As in the *High Command* case, GOTOVINA had “the right to assume that the commanders entrusted with such administrative functions would see to their proper execution,” in this case the various services.

(d) Gotovina was not considered by others to be responsible for security issues in the liberated areas

663. GOTOVINA’s lack of involvement (and thus lack of material ability to prevent or punish) in post-combat security matters is evidenced by the fact that he was never perceived to be a person to whom these concerns should be addressed.
664. Within the Croatian governmental authorities, GOTOVINA was not the official considered responsible for addressing crimes allegedly being committed by his subordinates. The HV liaison officer with UN and ECMM in Sector South, LUKOVIC, testified that after 6 August he never passed on information from internationals to GOTOVINA because GOTOVINA was in Bosnia.¹¹²⁶ LUKOVIC had no additional contact with GOTOVINA after 6 August.
665. The two men operationally charged with maintaining law and order during and after Storm, LAUSIC and MORIC, also never contacted GOTOVINA to seek his assistance. LAUSIC testified that he “never had any conversation with

¹¹²⁵ D-979,pg.4(Emphasis added).
¹¹²⁶ D-1687(Lukovic),paras.48-53.

General GOTOVINA about problems that occurred after the operation,”¹¹²⁷ and that there was never a need to contact GOTOVINA.¹¹²⁸ MORIC testified that he never contacted GOTOVINA because he never had a reason to do so, and that LAUSIC “didn’t tell me that he would need to refer back to Mr. GOTOVINA on any score, and Mr. GOTOVINA never actually featured in my conversations with Mr. LAUSIC.”¹¹²⁹

666. At a meeting of the top MUP and MP officials in Plitvice on 15 September, convened specifically to attempt to stop the crime wave, LAUSIC commented that the *only people responsible* for the implementation of state policy, *i.e.* the protection of people and property and creation of positive security situation, were present at the meeting.¹¹³⁰ Notably, GOTOVINA was not present.
667. ██████████ KARDUM,¹¹³¹ BUHIN,¹¹³² CETINA,¹¹³³ ██████████ ██████████ testified that they had no dealings with GOTOVINA during the indictment period.
668. Within TUDJMAN’s office, SKARE-OZBOLT testified that “GOTOVINA was not mentioned in the context of the task of stabilizing the area.”¹¹³⁶
669. PUHOVSKI from the CHC testified that, “no one ever mentioned GOTOVINA in relation to the crimes.”¹¹³⁷
670. The internationals on the ground also did not perceive GOTOVINA as being responsible. FLYNN,¹¹³⁸ AL-ALFI,¹¹³⁹ and BOUCHER¹¹⁴⁰ testified that they

1127 Lausic,T:15510:4-21;15503:2-12.
 1128 P-2159(Lausic),para.251.
 1129 Moric,T:25731:21-25733:1.
 1130 D-595,pg.5.
 1131 Kardum,T:9496-97.
 1132 Buhin,T:10049:9-13; P-963(Buhin),pg.6.
 1133 D-1745(Cetina),pg.14.
 1134 ██████████
 1135 ██████████
 1136 D-1471(Skare-Ozbolt),para.10.
 1137 P-2317(Puhovski),para.23.
 1138 Flynn,T:1347:23-1349:5; P-20(Flynn),pg.11,ln.12.
 1139 Al-Alfi,T:13928:17-13929:1.
 1140 D-1217(Boucher),para.40.

had no dealings with GOTOVINA. FORAND testified that he did not believe GOTOVINA to be responsible in the area.¹¹⁴¹

671. THEUNENS testified that there is no record of correspondence between MUP and GOTOVINA about crime, no record of LAUSIC seeking GOTOVINA's assistance in preventing or punishing crime, and no record of a Presidential transcript in which GOTOVINA is mentioned as someone who had the material ability to prevent or punish crime.¹¹⁴² He acknowledged that there is no record of written complaints from internationals to GOTOVINA about crime after 8 August,¹¹⁴³ and no reports from CERMAK to GOTOVINA about CERMAK's meetings with internationals concerning crime.¹¹⁴⁴
672. The Prosecution relies on CERMAK's 2004 suspect interview to claim that just because GOTOVINA would "come and go,"¹¹⁴⁵ and that he was "well acquainted with the situation on the ground,"¹¹⁴⁶ he somehow had law and order responsibilities in the liberated areas. These inferences lack credibility for the reasons previously stated by the Defence.¹¹⁴⁷ Moreover, the statements were not subjected to cross-examination, lack probative value, and should be given no weight by the Chamber, as least as to GOTOVINA.
673. THEUNENS conceded that there is no record that GOTOVINA's superior, CERVENKO, ever contacted GOTOVINA to bring to his attention concerns that troops under his command were committing crimes.¹¹⁴⁸ The only matters ever brought to GOTOVINA's attention by CERVENKO concerning his subordinates was FORAND's claim that Split MD forces were not behaving properly towards UNCRO and that GOTOVINA threatened ROBERTS.¹¹⁴⁹ CERVENKO never claimed that GOTOVINA was not properly disciplining his subordinates. Contrary to the inference the Prosecution argues, this

¹¹⁴¹ Forand,T:4125:20-4126:4;4127:20-4128:6.

¹¹⁴² Theunens,T:13497:10-13499:20.

¹¹⁴³ Theunens,T:13498:1-24.

¹¹⁴⁴ Theunens,T:13499:21-13500:5.

¹¹⁴⁵ 98bis,T:17429:12-13.

¹¹⁴⁶ 98bisT:17439:7-13.

¹¹⁴⁷ *Defendant Ante Gotovina's Response to Prosecution's Further Submissions on the Prosecution's Motion for the Admission Into Evidence of the Statements of the Accused Ivan Cermak and Mladen Markac*(27 February 2009).

¹¹⁴⁸ Theunens,T:13512:2-17.

¹¹⁴⁹ Theunens,T:13515:2-9.

demonstrates that CERVENKO did not consider GOTOVINA responsible for law and order in the area, or that he was failing to properly enforce discipline in the Split MD.

674. All of this evidence establishes a “reasonable explanation” of the evidence, namely that GOTOVINA did not have the material ability to prevent or punish subordinates for crime in the liberated territory.

(e) Forand did not meet with Gotovina to seek his assistance in addressing crime

675. The Prosecution claims that FORAND met with GOTOVINA on 8 August and 5 September, putting him on notice that crimes were being committed by his subordinates. The Prosecution’s position is not credible.

676. The SitRep of the meeting on 8 August contains no mention that GOTOVINA and FORAND discussed crime in any way.¹¹⁵⁰ FORAND testified that he did not attend the meeting with the intention of raising issues of crime, because it was GOTOVINA who invited FORAND to the meeting, and not vice-versa.¹¹⁵¹ The fact that the same SitRep does record a conversation with CERMAK about crime indicates that FORAND would have recorded a similar conversation with GOTOVINA had one taken place.

677. The Prosecution next relies on FORAND’s claim that in a 5 September meeting, he raised issues of crime allegedly committed by GOTOVINA’s subordinates. Again, the SitRep of the meeting contradicts FORAND’s claims. The SitRep states that the meeting was at GOTOVINA’s request, not FORAND’s, and that there was “no stated purpose for the meeting.”¹¹⁵² There is no mention that FORAND sought GOTOVINA’s assistance in establishing law and order.

678. The fact that FORAND did not ask for the meeting refutes any claim by the Prosecution that FORAND perceived GOTOVINA to be a person responsible for restoring law and order. Indeed, in the one letter FORAND wrote to

¹¹⁵⁰ P-359,pg.3.
¹¹⁵¹ Forand,T:4198:16-4199:22.
¹¹⁵² P-384,pg.4.

GOTOVINA after Operation Storm, FORAND wrote GOTOVINA to (1) protest hostile actions by HV soldiers against UNCRO; (2) seek the return of UNCRO vehicles taken by HV soldiers; and (3) ask GOTOVINA to assist him in preparing his briefing to Canadian military about how Storm was conducted.¹¹⁵³

679. FORAND never claimed that GOTOVINA's subordinates were engaged in widespread criminality in Sector South. That FORAND sent only one letter to GOTOVINA, and made no reference to widespread crime, indicates that FORAND did not perceive GOTOVINA to be responsible for law and order in the area.

6. Gotovina did not have the "material ability to prevent or punish" members of attached, non-organic units

680. GOTOVINA was in command of several attached, non-organic units, such as the 7GBr, that were not ordinarily part of the Split MD. These units were temporarily subordinated to GOTOVINA only for operational purposes. However, disciplinary oversight remained with those ordinarily in command of the units.¹¹⁵⁴ GOTOVINA requested disciplinary authority over the attached, non-organic units, without success.¹¹⁵⁵
681. BOTTERI testified that the Split MD could issue discipline against attached units, such as the 7GBr, only in "extraordinary cases" and that the "reporting system was set up in such a manner that this could not happen."¹¹⁵⁶ She testified that GOTOVINA's ability to discipline members of the 7GBr was "impossible to implement."¹¹⁵⁷
682. BOTTERI explained that the Split MD did not receive reports about disciplinary measures being imposed by commanders within attached, non-organic units, such as the 7GBr. Therefore, GOTOVINA was unable to

¹¹⁵³ **D-150.**

¹¹⁵⁴ **Botteri, T:10964:9-17.**

¹¹⁵⁵ **D-881, pg.2; D-878(Botteri), para.15.**

¹¹⁵⁶ **D-878(Botteri), para.16.**

¹¹⁵⁷ **Botteri, T:10892:5-18.**

“control, supervise or evaluate” whether those units were imposing discipline.¹¹⁵⁸

683. GOTOVINA thus had no material ability to monitor the imposition of discipline within units like the 7GBr. Furthermore, GOTOVINA was entitled to assume that the SIS and MPs would take appropriate steps to ensure that appropriate measures were imposed on members of the 7GBr who, for instance, had engaged in looting and had been stopped by the MPs.¹¹⁵⁹

E. Knew or had reason to know

i. Knowledge must extend to crimes by subordinates

684. Command responsibility is not a form of strict liability.¹¹⁶⁰ In every case, evidence must be shown that the accused “knew or had reason to know that the criminal act was about to be or had been committed” by a subordinate.¹¹⁶¹ Although actual knowledge may be inferred from circumstantial evidence,¹¹⁶² it may not be presumed by virtue of a position of command alone.¹¹⁶³
685. An accused had reason to know “only if information was available to him which would have put him on notice of offences committed by subordinates.”¹¹⁶⁴ This requires the accused to possess “information sufficiently alarming to justify further inquiry.”¹¹⁶⁵ The duty to investigate is limited in scope “to ascertain whether such crimes were committed or were about to be committed by his subordinates”¹¹⁶⁶ and only arises from the time

¹¹⁵⁸ **Botteri, T**;10969:4-20. Because the disciplinary records of the 7GBr were not recorded in the statistics of the Split Military District, the Prosecution had the burden of retrieving those disciplinary records and demonstrating that no disciplinary measures were taken by commanders of the 7GBr. The Prosecution has failed to prove beyond reasonable doubt that no disciplinary measures were taken.

¹¹⁵⁹ **D-2024, P-1134**,pg.4.

¹¹⁶⁰ **Blaskic, AJ**,para.406. *See also Celebici, AJ*,para.239; **Halilovic, TJ**,para.65.

¹¹⁶¹ **Halilovic, AJ**,para.59; **Kordic, AJ**,para.839; **Blaskic, AJ**,para.57.

¹¹⁶² **Galic, AJ**,paras.171,180-184; **Blaskic, AJ**,para.57; **Popovic, TJ**,para.1040.

¹¹⁶³ **Blaskic, AJ**,para.57; **Popovic, TJ**,para.1040.

¹¹⁶⁴ **Celebici, AJ**,para.241(citing **Celebici, TJ**,para.393); **Galic, AJ**,para.184;**Popovic, TJ**,para.1041.

¹¹⁶⁵ **Strugar, AJ**,para.298; **Hadzihasanovic, AJ**,paras.27-28(citing**Celebici, AJ**,paras.226,232,241); **Popovic, TJ**,para.1041.

¹¹⁶⁶ **Celebici, AJ**,para.241(citing**Celebici, TJ**,para.393); approved by **Celebici, AJ**,para.241.

at which the information becomes available.¹¹⁶⁷ Failure to seek out such information in the first place will not, on its own, trigger 7(3) liability.¹¹⁶⁸

686. The requisite knowledge cannot relate merely to general criminality or to crimes by non-subordinates.¹¹⁶⁹ It must specifically relate to crimes about to be or committed *by subordinates of the accused*.¹¹⁷⁰ Even if the general situation in an area involves widespread or systematic crimes, this does not create a presumption of knowledge with respect to subordinate crimes.¹¹⁷¹ Thus, the accused must be shown to have specific knowledge of the past or potential criminal conduct of one or more of his identified subordinates.¹¹⁷²
687. For example, the *Oric* Appeals Chamber held that the accused could not be held responsible where he only possessed general knowledge of the mistreatment of prisoners at the Srebrenica Police Station, and not specific knowledge of crimes “physically committed by Atif Krdzic, his only identified culpable subordinate.”¹¹⁷³
688. The fact that a superior takes general preventive measures, such as giving orders to comply with humanitarian law, cannot be used against him to show that he knew or had reason to know that his subordinates were about to commit crimes.¹¹⁷⁴ Precisely the opposite is true: “[i]n fact it is much less foreseeable for violations of international humanitarian law to occur when a commander has taken a series of general preventive measures to instill order and discipline in his troops than when a commander has not taken care to put in place a system which instills respect for the law and discipline.”¹¹⁷⁵

¹¹⁶⁷ *Kvočka*, TJ, para.317; *Celebici*, AJ, para.226; (“Article 7(3) does not impose a duty upon a superior to go out of his way to obtain information about crimes committed by subordinates unless he is in some way put on notice that criminal activity is afoot.”); *Celebici*, AJ, para.226.

¹¹⁶⁸ *Kvočka*, TJ, para.317; *Celebici*, AJ, para.226; *Blaskić*, AJ, para.62.

¹¹⁶⁹ *Oric*, AJ, paras.59-60.

¹¹⁷⁰ *Strugar*, AJ, para.302; *Celebici*, AJ, para.238 (requirement of knowledge “of possible unlawful acts *by his subordinates*”), para.239 (“A superior may only be held liable for the acts of his subordinates if it is shown that he ‘knew or had reason to know’ about them.”).

¹¹⁷¹ *Prosecutor v. Bagilishema*, ICTR-95-1A-A, AJ, 3 July 2002 (“*Bagilishema, AJ*”), para.42, 45 (referring to *Celebici*, AJ, para.238); *Oric*, AJ, paras.59-60.

¹¹⁷² *Oric*, AJ, paras.59-60.

¹¹⁷³ *Oric*, AJ, para.57, 55; *Krnjelac*, AJ, para.155.

¹¹⁷⁴ *Blaskić*, AJ, para.486; *Hadzihasanović*, TJ, para.100, fn.199.

¹¹⁷⁵ *Hadzihasanović*, TJ, para.151.

ii. Operation Summer-95

689. The Prosecution claims that because some units of OG North had been involved in burning and looting in Operation Summer-95, GOTOVINA was on notice that all of his troops in Operation Storm would burn, loot, and even kill civilians.
690. The Prosecution has failed to prove that prior to Operation Storm, any member of the Split MD unlawfully killed a Serb civilian at any time, including during the Grahovo operation. Accordingly, the Prosecution's argument with respect to murder does not withstand scrutiny.
691. Moreover, the only two units that were involved in the Grahovo Operation and which were subsequently used on the territory of Croatia during Storm were the 4GBr and 7GBr. The other units of OG North did not participate in Storm on Croatian territory and accordingly could not be responsible for any crimes falling within the scope of this indictment.¹¹⁷⁶

iii. The "leash"

692. Additionally, the Prosecution has attempted to use a Brioni meeting statement by GOTOVINA about one unit as evidence that he knew or had reason to know that deploying certain units would result in retributive and illegal activity by their members.¹¹⁷⁷
693. The Prosecution suggests that in stating that his troops had to be "kept on a leash," GOTOVINA implied that they were inclined to commit crimes. A close examination of this statement demonstrates that this suggestion is patently false. GOTOVINA was referring specifically to the 3rd Battalion of the 126th Regiment which did not even participate in the Grahovo operation, not to all of his forces.¹¹⁷⁸ Moreover, GOTOVINA was referring to their morale and their desire to fight for their country, not to any propensity to commit crimes. This is evident on the video of the 6 August meeting in Knin, where GOTOVINA stated as follows:

¹¹⁷⁶ Those units were units of the 3rd HVO GB; 2nd HVO GB; 1st Croatian Guards Brigade; 3rd Battalion of the 1st Guards Brigade; 81st Guards Brigade; and HVO Tomislavgrad MD. P-1125,pgs.6-8.

¹¹⁷⁷ PTB,para.56.

¹¹⁷⁸ P-461,pg.10

What's wrong with you, commanders?! You don't feel like waging war any more! And you were whining there three months ago, that you needed be kept on a leash so you wouldn't launch something yourselves! And now that you've got going, what's wrong with you now? Are you tired all of a sudden?¹¹⁷⁹

694. There is no evidence that the 3rd Battalion of the 126th Regiment committed any crimes during or after Operation Storm. GOTOVINA's use of the 3rd Battalion of the 126th Regiment is a non-issue, as is his reference to keeping them "on a leash." Accordingly, the Prosecution's claim that GOTOVINA knew or had reason to know that members of subordinate units would commit crimes based on his reference to a "leash" at Brioni is wholly without merit.
695. The Prosecution claims that GOTOVINA would have generally been aware of the "sense of bitterness" that prevailed in the Homeguard units and that this put him on notice of the "risk of offences."¹¹⁸⁰ There is no evidence in the record of any Homeguard unit of the Split MD committing any crime against Serbs or Serb property at any time prior to Storm. There is also no evidence that these units harbored particular animosity toward the Serb civilian population beyond what reasonably could be expected in wartime circumstances. In any event, it cannot be the case that every commander who knows that some of his soldiers have suffered during a war as a result of the actions of the opposing party, is on notice that those troops may commit crimes against civilians.¹¹⁸¹

iv. No notice of murder, cruel treatment, or inhumane acts by subordinates

696. The Prosecution alleges that GOTOVINA also knew or had reason to know that members of subordinate units engaged in unlawful killings, cruel treatment, or inhumane acts during and after Operation Storm.¹¹⁸²
697. The Prosecution provided no evidence that GOTOVINA had actual or presumed knowledge of a single murder committed by members of

¹¹⁷⁹ D-979,pg.6(Emphasis added).

¹¹⁸⁰ 98bis,T:17454:10-18;17436:3.

¹¹⁸¹ Celebici,AJ,para.238-239;Strugar,AJ,para.298-299;Hadzihasanovic,AJ,para.28,fn.75; Halilovic,TJ,para.68.

¹¹⁸² 98bis,T:17434:23-17440:18.

subordinate units.¹¹⁸³ Likewise, there was no evidence that GOTOVINA had actual or presumed knowledge of allegations that members of his subordinate units engaged in cruel treatment or inhumane acts.

698. The Prosecution contends that GOTOVINA knew or had reason to know of murders committed by subordinates from Croatian government sanitation reports.¹¹⁸⁴
699. These reports, copied to GOTOVINA along with numerous others, delineate numbers and locations of bodies collected and buried in Knin and Gracac cemeteries. They do not mention cause of death, suspicion of criminal activity, or a suspected perpetrator.¹¹⁸⁵
700. This lack of notice was confirmed by Prosecution expert THEUNENS¹¹⁸⁶ who cited these sanitation reports in his 800 page report. He conceded that there was no evidence that GOTOVINA received notice of murders allegedly committed by active members of the HV:¹¹⁸⁷

Q. Okay. So again my question is, the answer is no, you don't have evidence that General GOTOVINA was given notice of murders having been committed by someone in the HV?

A. I haven't come across documents during my -- the preparation of my reports that indicate notice of murders.¹¹⁸⁸

701. If the Prosecution's own in-house expert concedes that those sanitation documents did not provide notice of murders, it would be unreasonable to rely on these same documents to establish GOTOVINA's knowledge of murders.

¹¹⁸³ **Theunens, T:12570:6-16; 12609:1-6, 1-25.** Recognizing that there is no actual notice to GOTOVINA, at 98*bis* the Prosecution was reduced to arguing that it was "likely" GOTOVINA would have received reports of dead civilians in Knin and that he "would have heard" small arms fire in Knin. 98*bis*, T:17437:13-19. Given the propensity at the time for some soldiers to fire rounds in the air as a form of celebration the sound of small arms fire would not have been unusual. P-351, pg.4; P-354, pg.4.

¹¹⁸⁴ P-507; P-507.1; D-1057.

¹¹⁸⁵ D-232(4 August Zidovec order that MUP in cooperation with the HV clear the terrain of bodies and keep records on discovery of killed persons, identification and burial); D-233(5 August Zidovec order describing how bodies were to be buried); D-1571(6 August Zidovec order requiring photographing and fingerprinting of bodies)

¹¹⁸⁶ P-1113, pgs.501,505,506,522.

¹¹⁸⁷ **Theunens, T:12570:6-16; 12609:1-6; 12609:13-25; P-507; P-507.1; D-1057.**

¹¹⁸⁸ **Theunens, T:12609:1-5**

702. The Prosecution argues that GOTOVINA received actual notice of murders committed by subordinates through Croatian government reports and non-governmental organization (“NGO”) reports following Operation Storm.¹¹⁸⁹ It is unclear what NGO reports provided GOTOVINA with actual notice of murders committed by subordinates. UN organizations (UNCIVPOL, UNMOs, HRAT), the ECMM, the ICRC and the CHC issued reports discussing murder. However there is no evidence that GOTOVINA either received or was given any such reports.¹¹⁹⁰
703. At the Rule 98 *bis* hearing, the Prosecution asserted that GOTOVINA had knowledge of murders from “contemporaneous media reports of crimes includ[ing] reports of murders in the area,” and cited several English language reports and a single Croatian language article in the Feral Tribune.¹¹⁹¹ The Prosecution failed to provide a single piece of evidence that GOTOVINA, then involved in offensive operations in Bosnia, read those reports or was in possession of them. Instead, the Prosecution falls upon baseless speculation that he “monitored such media reports.”¹¹⁹²
704. In another convoluted argument, the Prosecution claims that GOTOVINA’s alleged threat against ROBERTS for being a “spy and provocateur” proved that GOTOVINA was monitoring media reports.¹¹⁹³ While the Defence disputes that the threat was made as characterized,¹¹⁹⁴ GOTOVINA’s well-founded criticisms of ROBERTS pre-dated Operation Storm.¹¹⁹⁵ Throughout his tenure in Knin, ROBERTS consistently provided support and legitimacy to the RSK.¹¹⁹⁶ In any event, the issues regarding ROBERTS’s actions do not establish that GOTOVINA was aware of a single media report of a subordinate involved in murder.

¹¹⁸⁹ PTB, para. 12.

¹¹⁹⁰ Flynn, T:1347:23-1349:5; P-359, pg. 3; Deverell, T:24210:4-18, 24211:5-19; D-1687 (Lukovic), paras. 48, 53.

¹¹⁹¹ 98*bis*, T:17438:22-25. The specific examples provided by the Prosecution were P-2319; P-686; P-712; P-687; P-451, pg. 243; P-685.

¹¹⁹² 98*bis*, T:17438:25.

¹¹⁹³ P-383, pg. 4; D-1538; P-407.

¹¹⁹⁴ D-710.

¹¹⁹⁵ Forand, T:4488:6-13

¹¹⁹⁶ D-699; Robert, T:7042:1-7044:14, 7051:16-7055:4; D-701-D-708;

705. Alternatively, the Prosecution cites an ECMM weekly assessment written by LESCHLY allegedly describing a meeting between ECMM officials and GOTOVINA on 20 September. LESCHLY reported that he raised the issue of killings in the liberated territory and GOTOVINA allegedly responded, “[w]hat killings?”¹¹⁹⁷ Additionally, MARKER-HANSEN, who accompanied LESCHLY at the meeting, did not include the information in the daily report and did not recall GOTOVINA making the statements LESCHLY attributed to him.¹¹⁹⁸
706. While contradictory evidence casts doubt on whether this exchange ever occurred, under any circumstances GOTOVINA’s alleged statement could equally be interpreted to confirm that he had no knowledge of any murders, let alone murders specifically involving his subordinates.¹¹⁹⁹
707. The Prosecution also argues that, despite receiving no reports discussing murder, GOTOVINA should have had situational awareness that subordinates had committed murders.¹²⁰⁰ First, the “situational awareness” argument ignores GOTOVINA’s role within the post-liberation Croatian government. Second, the fallacious argument is that since GOTOVINA knew of burning and looting (not murder) by one set of subordinates in a prior operation and was aware that the problem continued to a degree after Operation Storm, he should have known that a different set of subordinates was committing acts of murder.¹²⁰¹
708. The Prosecution conflates property destruction with murder to obscure the absence of evidence demonstrating GOTOVINA’s knowledge of alleged murders by his subordinates. There is no support in ICTY jurisprudence for the contention that knowledge of a property crime triggers a duty in a commander to investigate whether murder may also have occurred at a

¹¹⁹⁷ **P-893**, pg.2(17-23 September 1995 ECMM Weekly Report)

¹¹⁹⁸ **Marker-Hansen**,T:15055:7-15056:5.

¹¹⁹⁹ Compare the weekly report authored by LESCHLY with two contemporaneous reports written on 20 September 1995, neither of which mentions discussing killings with GOTOVINA. **Cf. D-799 and P-895.**

¹²⁰⁰ **Theunens**,T:12570:13-16.

¹²⁰¹ **98bis**,T:17435:21-17348:21; **D-792.**

different time and place, and by different units.¹²⁰² The Prosecution's argument is plainly contrary to the fundamental principle that knowledge must relate to specific crimes.¹²⁰³

709. Again, the MUP maintained general jurisdiction over crime, and if HV soldiers were implicated, the MUP contacted the MP Crime Police, not GOTOVINA, to conduct an investigation. GOTOVINA had no command or control over the crime investigation service of the MP Crime Police, which he was aware was functioning.¹²⁰⁴
710. In an effort to inculcate GOTOVINA for murder under the command responsibility theory,¹²⁰⁵ the Prosecution cites a report from LAUSIC to CERVENKO and SUSAK, related to events in the entire liberated territory which was copied to all HV military district commanders.¹²⁰⁶ With no indication whatsoever that a member of the Split MD was involved in murder, it states that the MUP and MPs were coordinating efforts to stabilize the liberated terrain by investigating HV and civilians alike.¹²⁰⁷ If anything, LAUSIC's report reassured every MD commander that the MPs were taking all appropriate measures to prevent and punish crime by HV wrongdoers.
711. If there was any issue regarding widespread acts of murder by members of the HV, this was certainly clarified when on 2 October the MP Crime Police received reports from MUP of allegations of 11 cases of murder by unknown perpetrators potentially committed by HV members.¹²⁰⁸ Following investigations, the MP Crime Police determined that, in cases of murders involving unknown perpetrators, there was only evidence of HV member involvement in two cases: Gosici and Zrmanja.¹²⁰⁹ In other cases, perpetrators

¹²⁰² *Krnojelac*, AJ, para.155; *Halilovic*, TJ, para.68, fn164; *Kordic*, TJ, para.427.

¹²⁰³ *Strugar*, AJ, para.302; *Celebici*, AJ, paras.238,239.

¹²⁰⁴ D-1532(Milas), paras.21,53,66,68; D-1533(Milas), para.11; D-567.

¹²⁰⁵ 98bis, T:17439:24;-17440:3.

¹²⁰⁶ D-567.

¹²⁰⁷ D-567, pgs.8-9.

¹²⁰⁸ D-800; D-802, pgs.4-5.

¹²⁰⁹ D-1536, pgs.2-3.

such as Veselko BILIC and Mario DUKIC were ultimately prosecuted for murder.¹²¹⁰

712. Indeed, by 3 December LAUSIC had assured SUSAK that 41 murders had been registered, of which 25 had been resolved, and “only two of the discovered perpetrators are members of the Croatian Army.”¹²¹¹
713. The MP Crime Police concluded that there was insufficient evidence of HV involvement in the remaining cases.¹²¹² Given this conclusion by the military’s top criminal investigators, there is no evidence that GOTOVINA could have known anything beyond what the MPs had concluded. If the investigations conducted by LAUSIC and the MPs were not satisfactory, this failure cannot be attributed to GOTOVINA for purposes of Article 7(3) liability.¹²¹³
714. With the lack of evidence presented, it is reasonable for the Trial Chamber to infer that GOTOVINA did not know or have reason to know that members of subordinate units committed unlawful killings of Serb civilians during and after Operation Storm.

F. Necessary and reasonable measures to prevent or punish

715. The record is replete with evidence of necessary and reasonable measures taken by GOTOVINA to prevent and punish crime within his subordinate units.¹²¹⁴ The Commentary to Article 87 of Additional Protocol I makes clear that the law intends to make a distinction between measures to be taken by a commander at the highest levels and the immediate commander of the perpetrator.¹²¹⁵ Accordingly, GOTOVINA’s actions must be viewed in the context of his role as an operational commander at the top of the chain of

¹²¹⁰ **D-800**; **D-802**, pgs.4-5; **D-1549**(Report regarding Bilic); **D-1550**(Bilic Judgment Excerpts); **D-9**(Documents Regarding the Killing of Sava Babic).

¹²¹¹ **D-1536**, pg.4.

¹²¹² **D-800**; **D-802**, pgs.4-5. Even assuming that GOTOVINA could have investigated on his own, it is unreasonable to argue that he would have reached a different conclusion than that reached by the MP Crime Police.

¹²¹³ *Popovic*, TJ, para.1046; *Boskoski*, TJ, para.536; *Boskoski*, AJ, paras.231,234,268,269,270; *Hadzihasanovic*, TJ, para.175; *Strugar*, TJ, para.376; *Krnjelac*, TJ, para.127; *Krstic*, AJ, para.143, fn.250.

¹²¹⁴ *Oric*, AJ, para.177.

¹²¹⁵ See Section VII.D.2; *Boskoski*, AJ, para.231; *Popovic*, TJ, para.1044; *Blaskic*, AJ, para.72; *Boskoski*, AJ, paras.230-231; *Bagilishema*, AJ, para.35; *Prosecutor v. Kayishema*, ICTR-95-I-A, AJ, 1 June 2001 (“*Kayishema*, AJ”), para.302.

command, and not as if he were an NCO personally dealing with the perpetrator.

716. Lt. Gen. JONES analyzed the record evidence, including the strategic goals provided by the Croatian leadership, the quality of the HV forces, the tactics employed by GOTOVINA, his focus as an operational commander on the continuing campaigns, and his attempts to address discipline before, during and after the operation.¹²¹⁶
717. While commenting that a commander always retains disciplinary responsibilities over his troops, Lt. Gen. JONES confirmed that given the circumstances and his critical focus on the offensive battles to come in Bosnia, GOTOVINA took all necessary and reasonable measures available to address breaches in discipline.¹²¹⁷ The Prosecution offered no expert testimony to contradict Lt. Gen. JONES's conclusion.

i. Gotovina genuinely and reasonably tried to maintain discipline

718. For both the duty to prevent and duty to punish, it must be proven that GOTOVINA failed to take measures that were necessary and reasonable.¹²¹⁸ "Necessary" measures are appropriate measures which show that the superior *genuinely tried* to prevent or punish, and "reasonable" measures are those reasonably falling within the material powers of the superior.¹²¹⁹
719. To be punishable, the commander's personal dereliction must be such that it constitutes *wanton, immoral disregard of the actions of his subordinates* amounting to acquiescence.¹²²⁰ A commander "cannot be held criminally responsible for a mere error in judgement as to disputable legal questions."¹²²¹ The Prosecution must prove that the commander either *deliberately failed to perform his duties or culpably or willfully disregarded them*.¹²²²

¹²¹⁶ D-1633(Jones Report).

¹²¹⁷ Jones,T:20968;19-20969;24; 20970:21-20971:1; D-1633(Jones Report).

¹²¹⁸ Hadžihanović,TJ,para.121;Blaskić,AJ,at para.72;Popović,TJ,para.1043;

Kordić,AJ,para.839;Krnojelac,AJ,para.172.

¹²¹⁹ Oric,AJ,para.177;Halilović,AJ,para.63;Popović,TJ,para.1043.

¹²²⁰ Halilović,TJ,para.46;Boskoski,AJ,para.268,fn.669.

¹²²¹ High Command,Vol.XII,pg 73-4.

¹²²² Bagilishema,AJ,para.35.

720. “Necessary and reasonable” measures may include protesting against or criticizing criminal action,¹²²³ taking disciplinary measures against the commission of crimes,¹²²⁴ reporting the matter to the competent authorities,¹²²⁵ issuing special orders aimed at bringing unlawful practices of subordinates in compliance with the laws of war¹²²⁶ and securing the implementation of these orders.¹²²⁷
721. Accordingly, the Prosecution must prove that there is “no reasonable interpretation of the evidence” other than that GOTOVINA did not “genuinely try” to prevent or punish crimes, and that he displayed a wanton, immoral disregard of the actions of his subordinates. Because no reasonable Trial Chamber could reach that conclusion on the basis of the evidence, an acquittal must be entered on these charges.

ii. **Gotovina’s measures to prevent**

1. **NCO training and education in humanitarian law**

722. GOTOVINA took numerous measures which evidenced a genuine intent to prevent crime.
723. As mentioned above, GOTOVINA warned his superiors about a lack of trained NCOs and established training centers in an effort to improve their quality.
724. Discipline and compliance with the Laws of War were consistent concerns for GOTOVINA.¹²²⁸ The evidence shows that units were given training in international humanitarian law well before Storm,¹²²⁹ including programs established with the assistance of the ICRC.¹²³⁰

¹²²³ *Halilovic*, T.J, para.89; *Strugar*, T.J, para.374; *Popovic*, T.J, para.1045.

¹²²⁴ *Halilovic*, T.J, para.89; *Strugar*, T.J, para.374; *Popovic*, T.J, para.1045.

¹²²⁵ *Boskoski*, A.J, para.230; *Hadzihanovic*, T.J, para.154; *Blaskic*, T.J, paras.329,335;

Popovic, T.J, para.1045.

¹²²⁶ *Halilovic*, T.J, para.74; *Strugar*, T.J, para.374; *Bagilishema*, T.J, para.265; *Popovic*, T.J, para.1045.

¹²²⁷ *Hadzihanovic* T.J, para.153; *Halilovic*, T.J, para.74; *Strugar*, T.J, para.378; *Popovic*, T.J, para.1045.

¹²²⁸ *D-1425*(Rajcic), para.17; *Herrick*, T:20060:6-19.

¹²²⁹ *D-1587*, pg.8.

¹²³⁰ *D-1583*(Barkovic), para.23; *D-1601*.

2. Gotovina addressed undisciplined conduct in Operation Summer-95

725. The Prosecution alleges that GOTOVINA knew or had reason to know that subordinate units he planned to use in Operation Storm, the 4GBr and 7GBr, were likely to commit crimes because certain unit members were involved in burning and looting incidents during a previous operation. Moreover, the Prosecution argues that GOTOVINA failed to properly punish unit members thereby giving tacit approval to their conduct and increasing the risk of additional crimes being committed. Finally, showing little regard for the reality of the situation given the impending VRS-RSK Vaganj offensive, the Prosecution also maintains that GOTOVINA should not have deployed the 4GBr and 7GBr during Operation Storm and should have delayed the operation until such time as his forces were fully developed.¹²³¹
726. The Prosecution has not alleged, nor is there evidence of, crimes such as killings, burnings and lootings committed by GOTOVINA's subordinates in Operations Winter-94, Jump 1 and Jump 2. As a result, there is no evidence that GOTOVINA led subordinate units that were consistently engaging in burning and looting prior to Operation Storm. However, the Prosecution has accused GOTOVINA of failing to take reasonable and necessary measures to address incidents in the wake of Operation Summer-95.¹²³²
727. The evidence suggests that late in that operation, the Operative Group North units ("OG North"), including the professional 4GBr and 7GBr, engaged in burning of some buildings in Grahovo and Glamoc.¹²³³
728. In response, additional MPs were requested and sent to Grahovo on 28 July to address the problem.¹²³⁴ SUSAK was put on notice and condemned the unacceptable behavior, expressing particular disappointment with the professional brigades.¹²³⁵ The MP was also on notice of the problem and was

¹²³¹ PTB,para.55; Jones,T:21039:19-21040:1,21042:6-21043:6; 98bis,T:17441:5-16.

¹²³² PTB,para.55; Jones,T:21039:19-21040:1;21042:6-21043:6.

¹²³³ P-71,pgs.48-49.

¹²³⁴ D-1979.

¹²³⁵ P-71,pg.73. Additionally, the Split MD Diary contains an order to shoot at the legs of people burning and looting. P-71,pg.48. This is indicative of a command structure that is not condoning or approving such activities.

responsible for taking appropriate measures, and in fact intervened when the commander of the 7GBr issued an order to shoot HV soldiers who burn and loot.¹²³⁶ Accordingly, the matter was referred to the proper authorities.

729. In addition to the drastic order of the 7GBr commander, both the 4GBr commander¹²³⁷ and ADEMI¹²³⁸ issued orders banning such misconduct and ordering disciplinary and criminal proceedings.
730. Recognizing the problem with a lack of discipline in OG North, GOTOVINA first ordered unit commanders to pay attention to discipline and to strictly forbid looting and burning.¹²³⁹ One reasonable interpretation of the evidence is that GOTOVINA, to send a message to OG North units on the eve of Operation Storm, removed the OG North commander.¹²⁴⁰
731. In disregard of all these measures, the Prosecution has argued that the removal of the OG North commander was not a disciplinary measure and would not send any message to OG North members. This contention was dismissed by Lt. Gen. JONES, who testified that removing a commander on the eve of battle, in this case the most critical battle for the country's very existence, was an extraordinary act to send a message that the unit's previous actions would not be tolerated.¹²⁴¹ BARKOVIC echoed JONES's view.¹²⁴²
732. As for the Prosecution's contention that the 4GBr and 7GBr should not have been permitted to participate in Operation Storm, Lt. Gen. JONES did not believe that taking the 4GBr and 7GBr off the line was a reasonable or even viable option given that the 4GBr and 7GBr were the only professional units available.¹²⁴³ A superior is not expected to perform the impossible, but must use every means within his material ability, based on the circumstances.¹²⁴⁴

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P-71,pg.49.

¹²³⁷

P-1113,pgs.320-21.

¹²³⁸

P-71,pg.50.

¹²³⁹

P-71(1 August meeting),pg.69.

¹²⁴⁰

D-793; Jones,T:20932:10-20933:16.

¹²⁴¹

Jones,T:20930:25-20931:16;20932:6-20933:16;20936:15-20937:20;20938:4-12.

¹²⁴²

Barkovic,T:20246:3-16.

¹²⁴³

Jones,T:21033:6-21034:19;21040:2-21041:9.

¹²⁴⁴

Blaskic,AJ,paras.72,417,499; Bagilishema,AJ,para.35.

733. Likewise, delaying Operation Storm was not an option. A delay would have had disastrous consequences for GOTOVINA's forces given that at the same time the VRS-ARSK was planning Operation Vaganj. The Brioni Meeting participants were aware that it was only a matter of days before MLADIC would counterattack GOTOVINA.¹²⁴⁵ Further, any decision to commence Operation Storm was ultimately a strategic level decision by the VONS, not by GOTOVINA.¹²⁴⁶
734. Given these circumstances, it is not reasonable for the Trial Chamber to infer that the only reasonable explanation of the evidence is that GOTOVINA did not demonstrate a genuine effort to address discipline problems encountered during Operation Summer-95.¹²⁴⁷
735. This evidence provides a "reasonable explanation" that GOTOVINA did not have a "wanton, immoral disregard" for the actions of subordinates.

3. Orders issued prior to Storm

736. Further actions and statements by GOTOVINA and Croatian government officials prior to Operation Storm reveal a genuine desire to act in compliance with the laws of war and avoid criminal activities. At a 2 August meeting, aware of burning incidents in Grahovo, SUSAK cautioned against having to put heroes of the Homeland War on trial¹²⁴⁸ by stressing that the MPs were to be energetic in preventing offenses, that the Military District commanders were to pass along orders to prevent burning and looting, and that protection of civilians and prevention of crimes was paramount.
737. In assessing this meeting and others like it, the Prosecution has referred to speculation by GALBRAITH that Croatia often made promises it did not intend to keep. SUSAK's admonitions on 2 August were not public comments, but were instructions to his subordinate military commanders on the eve of Operation Storm. To countenance the Prosecution's position, one would have to believe that SUSAK's *in camera* comments to senior officers

¹²⁴⁵ P-461,pgs.3,19,28.

¹²⁴⁶ Jones,T:21041:10-18; Zuzul,T:18304:25-18305:10.

¹²⁴⁷ Jones,T:20936:15-20937:20;20938:4-12,21033:6-21034:19.

¹²⁴⁸ D-409,pg.3; P-2159(Lausic),para.151.

were not meant to be followed, but rather were to be ignored. Such a distortion of the facts defies both reason and common sense, and should be rejected.

738. GOTOVINA included an attachment to his operational order requiring that units be instructed about the need to eliminate undisciplined behavior with a focus on preventing torching and destruction of property, proper conduct with civilians and POWs in accordance with the Geneva Convention, and providing support in the immediate establishment of civilian institutions following the conclusion of combat operations.¹²⁴⁹
739. In an effort to remind soldiers of obligations under the laws of war, booklets were provided to HV unit members prior to Operation Storm detailing the Geneva Conventions.¹²⁵⁰ Additionally, following the orders of their superior commanders, the 4GBr commander¹²⁵¹ and Homeguard unit commanders issued orders prior to Storm to protect civilians and treat them properly.¹²⁵²
740. Finally, to clarify the divisions of responsibility in the wake of Operation Storm, GOTOVINA's orders included a security plan that informed his subordinates that the MUP and the MP would be responsible for immediately controlling the liberated territory and for preventing crime, such as burning and looting.¹²⁵³ This security plan was not an Order to the MUP and MPs, but rather was sent for information to subordinates so as to familiarize them with the tasks of other services and branches of government.

4. Orders issued during Storm

741. During Storm, GOTOVINA continued to remind his subordinates about his orders banning all unlawful conduct, including burning and looting.
742. At the evening briefing of commanders on the night of 4 August, the Political Affairs assistant emphasized that, "Knin must not experience the same

¹²⁴⁹ **D-201; D-810**,pg.3.

¹²⁵⁰ **D-200**(Babacic),para.6; **Babacic**,T:21344:8-21;21345:11-22; **Sudac**,T:21366:5-21367:24,21376:3-15; **D-533; D-1602**.

¹²⁵¹ **P-1202**,pg.12.

¹²⁵² **Perkovic**,T:19449:3-10.

¹²⁵³ **P-1126**.

treatment as Grahovo.”¹²⁵⁴ THEUNENS testified that the officer was “probably” acting pursuant to GOTOVINA’s order in D-201.¹²⁵⁵

743. On the morning of 5 August, as his forces were about to enter Knin, GOTOVINA once again ordered “maximum fairness in treatment of civilians and behaviour towards UN.” The order was passed to all OGs and commanders.¹²⁵⁶
744. GOTOVINA’s orders on the treatment of civilians had visible results. As UN personnel remarked on 6 August, “at least some soldiers have been given clear and effective instructions to treat civilians in an appropriate manner.”¹²⁵⁷ ECMM reported “HV are treating the civilian population fairly” and “HV soldiers appear to be professional.”¹²⁵⁸
745. Both Political Affairs and SIS reported to GOTOVINA that civilians had been properly treated by HV forces.¹²⁵⁹ In the same reports, both services also reported that crimes had occurred with respect to property upon the initial entry into Knin, but that the MP had seized control, “preventing further destruction” of property and “confiscating looted items at checkpoints.”¹²⁶⁰ The coordinated activities of Political Affairs, SIS and the MP to regain control of the situation were at least in part due to GOTOVINA’s exhortations at the 6 August Knin meeting, previously discussed.

iii. Gotovina’s measures to punish

1. Commander’s duty under Croatian law with respect to duty to punish crime

746. BAJIC testified that within the Croatian system, a commander’s duty was to “inform the Military Police” of a crime, and then it was up to the MP to launch an investigation and file a report with the Military Prosecutor’s Office.¹²⁶¹ Furthermore, if a commander knows that the MP is already on notice of a

¹²⁵⁴ P-71,pg.83.
¹²⁵⁵ Theunens,T:12737:24-12738:3.
¹²⁵⁶ P-71,pg.84.
¹²⁵⁷ D-272.
¹²⁵⁸ D-334.
¹²⁵⁹ P-1133,pg.2;P-1134,pg.4.
¹²⁶⁰ P-1133,pg.2;P-1134,pg.4.
¹²⁶¹ Bajic,T:20737:7-20739:2.

crime, BAJIC said “it would be pointless” for the commander to report to them the same thing.¹²⁶² If a commander knows that the MP has been informed about a crime, he had no further obligations under the Criminal Procedure Act to report except to cooperate in the investigation.¹²⁶³

747. Judge MATULOVIC corroborated BAJIC, stating that a commander “couldn’t do anything else” other than inform the MP.¹²⁶⁴
748. The *Hadzihasanovic* Trial Judgment held that “referring the matter to the appropriate military judicial authority” is a necessary and reasonable measure where a commander is “unable to carry out his own criminal investigation” or to influence how the case is dealt with by the judicial authorities.¹²⁶⁵

2. Gotovina’s actions to punish crime

749. It is undeniably clear from the evidence that (1) GOTOVINA alerted the MP, SIS and Political Affairs about crime and that it was their duty to enforce the Rules of the Armed Forces;¹²⁶⁶ (2) the MP, Political Affairs, and SIS were aware of the issue of crime;¹²⁶⁷ and (3) the top officials in the country, including SUSAK, LAUSIC, CERVENKO and Miroslav TUDJMAN, were aware of the problem.¹²⁶⁸ Accordingly, under Croatian law GOTOVINA fulfilled all of his duties. The Prosecution never challenged LAUSIC, MILAS, MATULOVIC, BAJIC, or JONES with the proposition that GOTOVINA had breached a duty to report crime to the proper authorities, nor has the Prosecution challenged a witness with an example of such a breach.
750. On 6 August, on the first day after liberation of Knin, GOTOVINA immediately met with his subordinate commanders and admonished them for losing discipline among the ranks and implored the Political Affairs Department, the SIS and the MP to act by reminding them that they are the

¹²⁶²

Bajic, T:20737:7-20739:2.

¹²⁶³

Bajic, T:20739:11-18;20853:8-17.

¹²⁶⁴

Matulovic, T:20572:24-20573:8.

¹²⁶⁵

***Hadzihasanovic*, TJ, para.1061.**

¹²⁶⁶

D-792; D-979(Budimir and Juric both present at Knin meeting).

¹²⁶⁷

P-1133,pg.2; P-1134,pg.4; P-918; D-868; D-2024; D-2025; D-2026; D-2027.

¹²⁶⁸

P-203; D-506,pg.2.

guarantee for military culture and for the military reputation of the HV, and the enforcers of the Rules of the Armed Forces.¹²⁶⁹

751. In this address, GOTOVINA was disciplining his subordinates by informing them that they were not performing as expected.¹²⁷⁰ Further, he was encouraging the established system to step up efforts to punish and prevent crime.
752. GOTOVINA also issued numerous orders to properly handle and register war booty, and further orders to establish a commission for this purpose and to receive logs from units regarding war booty seized.¹²⁷¹
753. On 9 August, GOTOVINA ordered that criminal acts should be videotaped and photographed for future investigation.¹²⁷²
754. On 10 August, GOTOVINA ordered that resolute measures be taken against all those who violate military discipline, including burning and looting, and that there be no arbitrary movement of soldiers.¹²⁷³ This order was then passed down the chain of command.¹²⁷⁴
755. GOTOVINA's order to cease arbitrary movement of soldiers was a "genuine effort" to address concerns that AWOL¹²⁷⁵ soldiers may be involved in activities such as looting and burning.¹²⁷⁶ Indeed, due to the lack of skilled NCOs, one fundamental problem was soldiers "roaming" the area of

¹²⁶⁹ **D-792, D-979.**

¹²⁷⁰ **Jones,T:21006:14-21007:5; Deverell,T:24201:17-24202:10.**

¹²⁷¹ **D-979**(6 August video-war booty must be properly logged); **D-643**(6 August GOTOVINA order to OG Sibenik and OG Zadar requiring proper logging of war booty and requiring the lists of war booty to be submitted to the MP); **D-981**(7 August GOTOVINA order forming a commission to inspect war booty); **D-208**(Kotlar report from the 113th Homeguards regarding collection of war booty); **D-866**(11 August inventory report of the 4GBr); **D-867**(Krsticevic's 13 August war booty log to GOTOVINA concerning 4GBr);

¹²⁷² **P-71,p.95.**

¹²⁷³ **D-204.**

¹²⁷⁴ **D-205; D-325; D-841; D-643.**

¹²⁷⁵ Absent without leave.

¹²⁷⁶ **Jones,T:21034:11-21.** GOTOVINA's order can also be traced to the 151% increase in disciplinary measures within the Split MD for the third quarter of 1995, a large number of which were for being absent without leave from their unit. **P-1016.**

responsibility outside the chain of command,¹²⁷⁷ which GOTOVINA attempted to redress through this order.

756. On 12 August, TOMASEVIC of the Split MD Political Affairs Section warned that the policy of the President and the Minister of Defence was to stop burning, looting, killing of livestock and improper treatment of civilians, and that responsibility lay with Political Affairs workers along with the SIS and the MP to take punitive measures and launch disciplinary proceedings against violators.¹²⁷⁸ This warning was then passed down the chain of command.¹²⁷⁹ THUEUNENS acknowledged that this was a warning from the Split MD command and not to the Split MD command.¹²⁸⁰
757. As outlined by a Political Affairs report on 13 August, in keeping with GOTOVINA's Attack Order, particular attention was paid to elimination of negative conduct, with the focus on preventing looting and the destruction of the major populated areas along with protection of religious institutions. This was accomplished through coordination between Political Affairs, SIS and the MP.¹²⁸¹
758. Despite attempts to prevent crime, a number of buildings were destroyed either in part or completely by rogue soldiers, mostly by Homeguards conscripts who were refugees exacting revenge.¹²⁸²
759. On 18 August 1995, GOTOVINA ordered that for the protection of civilians and to increase the public order and discipline, soldiers returning from the front were to be searched for weapons and the weapons seized.¹²⁸³
760. On this same date, burnings and lootings by the 134th Homeguards unit were reported in the area of OG West (*See* Appendix B).¹²⁸⁴ SIS reported the

1277

D-984,pg.2.

1278

P-918; **Milas**,T:19216:6-19217:3; **Theunens**,T:12775:3-22.

1279

D-647(warning passed to 142nd); **D-648**(warning passed to 112th Zadar Brigade)

1280

Theunens,T:12775:3-22; **Milas**,T:19216:6 to 19217:3.

1281

D-810.

1282

D-810,pg.3.

1283

D-888.

1284

P-71,pg.116.

- burnings and that the commander of the 134th did not have the authority within his unit to comply with the orders of the OG West commander.¹²⁸⁵
761. Thereafter, disciplinary measures were imposed on the 134th. An order was issued tasking a commission to check the war booty of the 134th and the entire 134th was taken offline, being reduced from 2302 members as of 21 August 1995 to only 187 men as of 20 October 1995.¹²⁸⁶
762. In addition, the OG West commander issued an order to restore discipline¹²⁸⁷ which was then passed down the chain of command.¹²⁸⁸
763. Demobilization was one of the important disciplinary measures when dealing with the problems caused by the Homeguard units.¹²⁸⁹ On 19 August, pursuant to the oral order of Split MD Command, the OG West commander also ordered the demobilization of problem soldiers.¹²⁹⁰ This order was then passed down the chain of command.¹²⁹¹
764. A key to demobilization as a disciplinary measure was the involvement of the SIS in ensuring discipline.¹²⁹²
765. The Prosecution has challenged the genuineness of these measures, arguing demobilization was not a necessary and reasonable measure to punish perpetrators, but instead was reckless because suspected perpetrators should have been kept within the military structure to ensure their adequate punishment through disciplinary and/or criminal measures.¹²⁹³ The Prosecution offered no record evidence to justify this opinion, and never challenged a single witness in support of its position. The unchallenged evidence on demobilization as a disciplinary measure is from Prosecution

¹²⁸⁵ **D-984**,pg.2

¹²⁸⁶ **D-985; D-986; D-987**

¹²⁸⁷ **D-650.**

¹²⁸⁸ **D-651**(113th passes down Fuzul's order on 20 August); **D-653**(142nd passes down Fuzul's order on 20 August); **D-889**(112th Brigade order of 20 August to take all necessary disciplinary and criminal measures to restore discipline and prevent setting fire to facilities pursuant to Fuzul's order)

¹²⁸⁹ **P-2159**(Lausic),paras.191,211; **Lausic,T:15292:2-20; D-878**(Botteri), para.10;

Botteri,T:10919:12-17; D-887.

¹²⁹⁰ **D-884**(Fuzul 19 August order to demobilize problem soldiers).

¹²⁹¹ **D-885**(Cerina order citing Fuzul's order); **D-886**(Nakic passes Fuzul's order to 142nd to let troublemakers go).

¹²⁹² **P-2159**(Lausic),paras.35-36.

¹²⁹³ **98bis,T:17445:22-17446:12.**

witness LAUSIC, who described demobilization as the strongest measure in dealing with undisciplined reserve forces.¹²⁹⁴ Membership in the HV was for many men their only means of obtaining a salary, social security and health insurance.¹²⁹⁵

766. The Prosecution asked Lt. Gen. JONES to confirm the importance of timing between notice of a problem and taking measures to address the problem, implying that GOTOVINA unreasonably delayed taking reasonable and necessary measures to the extent that he condoned and encouraged undisciplined behavior.¹²⁹⁶
767. Lt. Gen. JONES clarified that, although it is important to take action and not to condone misconduct, the action taken and the timing are dependant on the scope of responsibility and authority as well as the operational situation.¹²⁹⁷
768. As set forth above, the operational situation required GOTOVINA's primary focus to be forward on the ongoing battle and the impending operations in Bosnia.¹²⁹⁸ Additionally, the MUP and the MPs were tasked with the primary responsibility of addressing crimes that occurred in sovereign Croatian territory.
769. Further, the Prosecution only suggested one instance of an alleged delay in taking action to address problems with subordinates. The Prosecution compared the 12 August report of political affairs (**P-918**) with the 19 August order from OG West Commander Fuzul (**P-1140**) to his subordinates to take measures to prevent criminal actions.¹²⁹⁹
770. First, this is a faulty premise because, as explained earlier in this section, the order from Commander FUZUL was directly related to an issue that arose the previous day within the 134th Homeguards. Second, the fact that the Political Affairs chain of command and the Split MD organic chain of command were

¹²⁹⁴ **P-2159**(Lausic),para. 210; **D-887**(Example from 16 August of demobilization as a disciplinary measure). Further, the Prosecution never challenged LAUSIC on this point and never called its own expert in operational command, Gen. Andrew PRINGLE, despite having him on their witness list.

¹²⁹⁵ **P-2159**(Lausic),para191; **D-878**(Botteri),para.10.

¹²⁹⁶ **Jones,T:21004:4-21005:17.**

¹²⁹⁷ **Jones,T:21004:4-21005:17**

¹²⁹⁸ **Jones,T: 21044:17-21045:13**

¹²⁹⁹ **Jones,T:21056:2-24.**

both taking measures to prevent further incidents shows the intolerance for crime was system-wide.

771. Finally, as corroborated by THEUNENS, there are no references in the Split MD Operational Diary to burning or looting by units in the territory of the Republic of Croatia after 18 August.¹³⁰⁰ Indeed, there is no evidence of any HV units engaging in unlawful activity in Croatia after 18 August.
772. Given that Major BUDIMIR reported to the entire MP Administration (including LAUSIC) on 7 September that after the “initial 4-5 days,” all incidents of burning and looting were prevented,¹³⁰¹ the Trial Chamber can reasonably infer that GOTOVINA received similar information from BUDIMIR, which would have indicated that measures taken by 18 August were effective. There is no evidence that Political Affairs or SIS reported anything different to GOTOVINA. FLYNN corroborates this inference by his testimony that the burning peaked around 20 August and “started to wind down toward the end of the month.”¹³⁰²
773. Therefore, a “reasonable explanation of the evidence” is that the measures taken by GOTOVINA and his subordinate commanders to discipline subordinates who were burning and looting were effective, and that GOTOVINA was led to believe that they were effective.

3. Gotovina enforced military discipline

774. A commander discharges his disciplinary duties by ensuring that there is a system established to address discipline concerns and that the system functions.¹³⁰³ In addition to the individual commanders at all levels, the HV disciplinary system relied upon and involved the MP, SIS and Political Affairs.¹³⁰⁴ As for disciplinary measures taken within the Split MD, GOTOVINA would not have had knowledge of the specific types of discipline that were being issued by commanders below the level of Brigade

¹³⁰⁰ **Theunens**,T:12847:7-10;12876:7-17. Although the crime wave swept over the liberated territory after this date there were no units of GOTOVINA involved.

¹³⁰¹ **D-1286**,pg.16.

¹³⁰² **P-20**(Flynn),pg.14; **Flynn**,T:1311:21-1313:20.

¹³⁰³ **Deverell**,T:24439:11-24440:13;**Boskoski**,AJ,para.230.

¹³⁰⁴ **P-918**

Commander,¹³⁰⁵ and (as explained previously) would have had no knowledge of the types of discipline being issued within attached units such as the 7GBr.

775. Even though the Split MD had a 151% increase in disciplinary proceedings in the period including Operation Storm,¹³⁰⁶ the Prosecution alleges that GOTOVINA failed to utilize the disciplinary system at his disposal to punish the alleged crimes of his subordinates.¹³⁰⁷
776. First, the Prosecution cites a GOTOVINA order of 22 September which imposed a curfew in Jajce, Bosnia.¹³⁰⁸ Putting aside that Homeguard regiments had no barracks but instead lived at home and would convene at assembly points when mobilized,¹³⁰⁹ the Prosecution fails to acknowledge that Bosnia is a separate country and that GOTOVINA had no comparable authority to order a curfew in Croatia. Moreover, on 10 August, GOTOVINA did order that HV troops should remain with their units and soldiers were subsequently disciplined for being AWOL.¹³¹⁰
777. Second, the Prosecution cites a 13 September order relating to property destruction in Drvar, Bosnia, and steps ordered to monitor criminal activity.¹³¹¹ As with Jajce, Bosnia, this order pertains to actions in occupied territory, not in the Republic of Croatia where the civilian authority was responsible for law and order. GOTOVINA had no authority to set up his own enforcement mechanism on Croatian soil.
778. Third, the Prosecution points to an order of 22 May 1995 and argues that GOTOVINA ordered an investigation.¹³¹² A review of the pertinent documents reveals the inaccuracy of the Prosecution's position. In fact, on 21 May, an HV soldier detonated a hand grenade causing several deaths. Immediately, the MPs and the MUP acting *ex officio* were seized of the matter and LAUSIC was informed as was the Military Judge and Prosecutor. By

¹³⁰⁵ D-878(Botteri),para.7.
¹³⁰⁶ Theunens,T:12575:14-12576:9.
¹³⁰⁷ 98bis,T:17445:5-21.
¹³⁰⁸ 98bis,T:17443:22-17444:1; P-1142.
¹³⁰⁹ P-2159(Lausic),para.97; D-1547(Bilic),para.3.
¹³¹⁰ D-204.
¹³¹¹ 98bis,T:17443:22-17444:1;D-655.
¹³¹² 98bis,T:17443:22-17444:1;P-1018;P-1019.

nightfall, the suspect was in custody. The next day, on 22 May, GOTOVINA ordered that an inquiry be undertaken to determine the “causes and consequences” of the crime. He did not mandate law enforcement to do anything that they were not already doing.

779. Article 31 of the Croatian Code of Military Discipline states that a commander is not obligated to institute disciplinary proceedings if an offence is also a criminal offence.¹³¹³ As a practical matter, disciplinary measures were unnecessary if the act was also a crime because criminal punishment subsumed the disciplinary punishment rendering disciplinary proceedings superfluous.¹³¹⁴
780. By October 1995, the Split MD reported that for the third quarter of that year (which includes the indictment period), disciplinary measures increased 151%.¹³¹⁵ In April 1996, the Ministry of Defense Legal Affairs Department issued a report stating that the Split MD had a high number of disciplinary proceedings and that Split MD was the leader in terms of discipline.¹³¹⁶
781. The vast majority of these disciplinary actions related to AWOL soldiers. This is to be expected given GOTOVINA’s 10 August order prohibiting arbitrary movement of HV members in the liberated areas. AWOL was a violation of military discipline that could be easily proven. If a member of the HV was in the liberated territory without the knowledge of his unit commander as required,¹³¹⁷ he had violated GOTOVINA’s order and the Military Code and was AWOL.
782. When examining the totality of circumstances, the Prosecution has completely failed to prove that GOTOVINA did not discharge his disciplinary duties as an operational commander. As expert witness DEVERELL testified, an operational commander with on-going combat duties is “absolutely focused”

¹³¹³ P-1007,pg.10; Botteri,T:10946:2-14.

¹³¹⁴ Zganjer,T:11576:6-11577:12; Theunens,T:12730:13-18; Galovic,T:19824:24-19825:10;

Bajic,T:20736:22-20737:6.

¹³¹⁵ D-892; Theunens,T:12575:13-12576:18

¹³¹⁶ D-893,pgs.5,9.

¹³¹⁷ D-204.

and “does not have time to deal with other matters.”¹³¹⁸ Instead, he has to ensure that there is a proper system in place that can ensure discipline.¹³¹⁹ Given the evidence set forth above, there is no question that GOTOVINA justifiably relied on the system in place to prosecute crime and enforce discipline, and that he fulfilled his disciplinary responsibilities.

783. As a result, a reasonable interpretation of the evidence is that GOTOVINA demonstrated the “genuine intent” to punish crime and did not have a “wanton disregard for the actions of his subordinates.”

4. Prosecution has failed to prove that Gotovina did not take necessary and reasonable measures

(a) Theunens’s opinions were not credible

784. With no expert on command responsibility,¹³²⁰ the Prosecution relied upon THEUNENS, its in-house analyst and former Belgian Army platoon commander unpublished in the area of military discipline, with limited knowledge of the Croatian Code of Military Discipline.¹³²¹ In fact, he had only begun studying the Code in 2007, with materials provided solely by the Prosecution.¹³²²
785. According to THEUNENS, the necessary and reasonable measures that GOTOVINA failed to take were that (1) he failed to insert a military governor into the liberated territory following the operation as he had done in Drvar, Bosnia in a subsequent operation; and (2) he primarily employed his powers to discipline for violations or crimes that would jeopardize the accomplishment of specific combat tasks and combat operations, rather than for crimes against the civilian population such as looting and burning.¹³²³
786. THEUNENS’s contention that a “military governor” should have been appointed again ignores that Drvar, Bosnia was occupied territory in another

¹³¹⁸ Deverell,T:24200:12-16

¹³¹⁹ Deverell,T:24440:1-7

¹³²⁰ In fact, the only such witness identified by the Prosecution, PRINGLE, was never called to testify.

¹³²¹ Theunens,T:12255:17-23.

¹³²² Theunens,T:12254:15-20,12258:9-13,12259:14-21.

¹³²³ Theunens,T:12843:17-12844:7; P-1113; 98bis,T:17618:11-17.

country, whereas the “Krajina” was part of Croatia. THEUNENS’ suggested step would have been tantamount to a *coup d’etat*.¹³²⁴

787. THEUNENS’s second flawed contention exposes a lack of understanding of the Croatian criminal justice and the HV disciplinary systems.
788. As discussed previously, GOTOVINA had no responsibility for, or authority over, the criminal justice system. Although general jurisdiction in Croatia is assigned to the civilian prosecutor, if it is established that the offence falls within the scope of work of the military justice system, the procedure would be taken over by the military prosecutor.¹³²⁵
789. GOTOVINA could not, nor did he ever attempt to, influence the work of the civilian prosecutors¹³²⁶ or the military court.¹³²⁷
790. Moreover, GOTOVINA had no authority to conduct an investigation into a crime parallel to the investigation being conducted by the MP and the Military Prosecutor’s Office.¹³²⁸ Conversely, military prosecutor’s offices and military courts had nothing to do with disciplinary procedures because there were separate military disciplinary courts and military disciplinary prosecutor’s offices set up for disciplinary purposes.¹³²⁹ Once the military or civilian prosecutor’s offices took criminal action, disciplinary action was superfluous.¹³³⁰
791. THEUNENS’s position as to GOTOVINA’s failure to take necessary and reasonable measures to punish crime is without foundation.

¹³²⁴ **Theunens**,T:12843:1-12845:21

¹³²⁵ **D-1626**(Bajic),paras.6,14.

¹³²⁶ **Galovic**,T:19719:18-19720:1.

¹³²⁷ **Matulovic**,T:20489:9-24.

¹³²⁸ **Bajic**,T:20736:22-20739:18,20780:16-20781:4.

¹³²⁹ **Bajic**,T:20735:15-20736:6

¹³³⁰ **Zganjer**,T:11576:6-11577:12;**Theunens**,T:12730:13-18;**Galovic**,T:19824:24-19825:10;**Bajic**,T:20736:22-20737:6.

(b) Gotovina was not responsible for prevention and investigation of crimes by the MP

(i) Orders to the MP

792. The Prosecution erroneously asserts that GOTOVINA failed to take necessary and reasonable measures to prevent crime because “military police units [were] subordinated to his command, which he could have used to control discipline amongst his personnel and to prevent crimes.”¹³³¹ The Prosecutor’s premise that GOTOVINA was responsible for directing MP activities in the area of crime prevention and investigation is simply incorrect.
793. LAUSIC, not GOTOVINA, was in command of the MP for purposes of ensuring discipline, and preventing and prosecuting crime. LAUSIC acknowledged that he was in command of the MP in Operation Storm, and exercised this command in the field through JURIC.¹³³²
794. Following the same model as Operation Flash, on 2 August the Croatian government charged MORIC and LAUSIC, not GOTOVINA, with preventing and prosecuting crime during and after Operation Storm.¹³³³
795. After the meeting on 2 August, LAUSIC immediately issued an order appointing JURIC as the “coordinator” of the work of the 72nd and 73rd MPs and subordinating unit commanders to JURIC.¹³³⁴ Pursuant to this order, JURIC was to report every day to LAUSIC about the status of law and order, including the number of criminal reports filed against HV members.¹³³⁵ The order did not require JURIC to provide any information to GOTOVINA, nor did JURIC do so.¹³³⁶ Both LAUSIC and JURIC testified that JURIC was not under the command of GOTOVINA.¹³³⁷
796. LAUSIC ordered JURIC to ensure the implementation of all military police tasks in the 72nd MP zone of responsibility, and LAUSIC gave JURIC the authority to “undertake all measures to ensure efficient and effective

¹³³¹ PTB, paras. 61-67; POS, T:477:1-20; 98bis, T:17425:22-25.
¹³³² Lausic, T:15416:16-23; 15432:5-9; D-567, pg. 2; D-978, pg. 3.
¹³³³ D-1484; Skare-Ozbolt, T:18128:14-18129:15
¹³³⁴ D-267, pg. 4.
¹³³⁵ D-267; See also D-2028; D-844.
¹³³⁶ Juric, T:27431:23-27432:16; 27438:24-27439:4.
¹³³⁷ Juric, T:27438:24-27439:4; Lausic, T:15405:6-9; Theunens, T:12643:15-19.

implementation of military police tasks in the 72nd MP and OG North zones of responsibility,”¹³³⁸ including the power to replace BUDIMIR “on the spot” if BUDIMIR did not comply with LAUSIC’S orders.¹³³⁹ GOTOVINA had no similar power.

797. The evidence convincingly demonstrates that LAUSIC was responsible before, during and after Operation Storm to exercise command over the MPs to prevent, investigate and process crime committed by HV members. It was LAUSIC who met with the MUP on 3 August to coordinate their joint efforts,¹³⁴⁰ and based on that meeting LAUSIC issued the following orders to the MP:

- a. coordinate its activities with MUP;
- b. establish law and order in populated places through the establishment of joint checkpoints with the MUP;
- c. ensure that the checkpoints move with the advancing frontline;
- d. take over prisoners of war from the HV units and deliver them to MUP; and
- e. hand over women, children and the elderly to MUP.¹³⁴¹

798. By 4 August, BUDIMIR implemented LAUSIC’S tasking order, and did not send a copy of his order to GOTOVINA.¹³⁴² LAUSIC confirmed that 80 checkpoints were set up on 4 August in compliance with his orders to prevent the uncontrolled taking of the spoils of war.¹³⁴³

(ii) MP Rules: Daily operative tasks

799. In turning to the 1994 Rules governing the work of the MP, the Prosecution claims that GOTOVINA exercised command over the MP pursuant to Article

¹³³⁸ **D-268; Lausic,T:15400:14-25.**

¹³³⁹ **D-45(Lausic),pg.6; Theunens,T:12622:1-10;12623:21-12624:9;Lausic,T:15413:19-15414:4;Milas,T:19311:19-19312:8.**

¹³⁴⁰ **D-45; P-2159(Lausic),para.159.**

¹³⁴¹ **D-269**

¹³⁴² **P-2200**

¹³⁴³ **D-292,pg.5**

9.¹³⁴⁴ An examination of the Rules refutes this inference. Pursuant to Article 8, LAUSIC had command and control over the MP, and it was through this power that LAUSIC was operationally responsible for the MPs work in establishing law and order in the liberated areas. Article 9 gave no power or responsibility to GOTOVINA to command the MP in providing general security, and he had no command whatsoever over the MP crime investigation service.¹³⁴⁵

800. Indeed, if GOTOVINA had general command over the MP pursuant to Article 9, then LAUSIC would have had no need to subordinate the 72nd MPs on 2 August for “daily operational command” to GOTOVINA, while retaining “command and control” to himself.¹³⁴⁶ As JURIC explained, “daily operative orders are issued by the commander of the military district where members of the MP, in accordance with their powers, *can give support to the carrying out of the task issued by the commander to his own units.*”¹³⁴⁷ In other words, GOTOVINA could issue “daily operational orders” to the MP to the extent necessary to accomplish the tasks he had been ordered to achieve. GOTOVINA never received any order to maintain security in the liberated areas. This task was left to MORIC and LAUSIC. Accordingly, the Prosecution’s reliance on Article 9 is misplaced.

(iii) MP reporting

801. The reporting system during and after Operation Storm also proves that GOTOVINA was not in command of the MP in preventing and prosecuting crime. THUENENS testified that GOTOVINA did not receive any reports on the location and movement of checkpoints.¹³⁴⁸ He did not receive reports about the coordination meetings with the MUP. Instead, special daily reporting about implementation of all military police tasks went exclusively to LAUSIC directly from JURIC, although sometimes MP company

¹³⁴⁴ **98bis**, T:17427:4-7.

¹³⁴⁵ **D-1532**(Milas), paras.55,66,67; **D-1533**(Milas), paras.11,14; **D-1673**, pgs.34-35,40.

¹³⁴⁶ **D-267**, pg.4; **D-292**, pg.3; **D-567**, pg.2

¹³⁴⁷ **Juric**, T:27480:4-8(Emphasis added).

¹³⁴⁸ **Theunens**, T:12692:5-10;12693:8-24.

commanders sent their reports directly to LAUSIC.¹³⁴⁹ JURIC testified that he did not send reports to GOTOVINA.¹³⁵⁰

802. Moreover, BUDIMIR was required to file a written report to LAUSIC, not GOTOVINA, accounting for the 72nd MPs performance during and after Operation Storm.¹³⁵¹ GOTOVINA was not even copied on this accounting. LAUSIC then used BUDIMIR's accounting to prepare his own report detailing the work of the MP in Operation Storm.¹³⁵² LAUSIC assessed that the MPs followed the HV into the liberated areas and "prevented arson and looting of the spoils of war," that MP units had been established in Knin and that they are "successfully carrying out their duties in cooperation with the MUP."¹³⁵³
803. LAUSIC also reported to CERVENKO on 15 August that "in larger places and towns, 24-hour patrols and beat service are securing public peace and order, preventing arson and uncontrolled removal of the spoils of war."¹³⁵⁴ LAUSIC informed SUSAK that the MPs are taking "action against a large number of HV members, preventing the removal of property from structures, and appropriating materiel, equipment and other items that HV members were not authorized to take out of structures."¹³⁵⁵ No one ever asked GOTOVINA to provide a report about the work of the MP.
804. A reasonable explanation of this evidence is that the commander who was responsible for filing with the Main Staff a written accounting of the work of the MPs during Storm was in fact in command and control of its performance during the Operation. GOTOVINA filed no such reports.
805. The Prosecution also claims that because GOTOVINA received daily reports from the MP, this establishes his overall command. These daily reports were

¹³⁴⁹ **Theunens**,T:12695:19-12697:12; **P-978**; **P-879**; **D-1378**; **D-1298**; **D-1295**; **D-732**; **D-733**; **D-734**; **D-737**.

¹³⁵⁰ **Juric**,T:27438:24-27439:4.

¹³⁵¹ **D-737**.

¹³⁵² **D-292**.

¹³⁵³ **D-292**,pgs.6,8,9.

¹³⁵⁴ **D-292**,pg.13.

¹³⁵⁵ **D-293**,para.2.4; **D-400**(12 August report from LAUSIC to SUSAK and CERVENKO: "At checkpoints, and through car patrols, items from property that was left behind and from the war booty, that were taken without authorization, are reclaimed from members of the HV.")

distributed to a wide range of recipients, including the MUP, LAUSIC, garrison commanders, the military court and the military prosecutor's office.¹³⁵⁶ Accordingly, since all the recipients could not have been in charge of the MP, receipt of the daily reports alone does not demonstrate command over the MP. Moreover, the daily reports for 4 August through 30 September contain no information about HV members committing burnings, lootings or killings. LAUSIC knew that the daily reports did not provide such relevant information, which is why he sent JURIC and others from Zagreb to be his "eyes and ears" in the field.¹³⁵⁷ Only JURIC's reports contained information about crimes such as looting and actions being taken by the MPs.¹³⁵⁸

(iv) Lausic's responsibility

806. The evidence amply demonstrates that it was LAUSIC, not GOTOVINA, who was responsible for utilizing the MP to prevent and punish crime in the aftermath of Operation Storm. MORIC exclusively contacted LAUSIC, not GOTOVINA, to address security problems with military personnel in the liberated areas.¹³⁵⁹ LAUSIC indeed issued all relevant orders to the MPs concerning security in the liberated areas.¹³⁶⁰ GOTOVINA issued no such orders.
807. During a meeting of the Croatian government on 23 August, the Assistant Minister of Defence reported to the Government that it was LAUSIC, not GOTOVINA, who had been ordered the previous day to establish joint checkpoints and joint control with the MUP in the settlements "particularly in regard of stealing of property and taking away the items."¹³⁶¹
808. The Prosecution has not established that GOTOVINA failed to take necessary and reasonable measures by failing to deploy the MP in order to improve security in the Split MD.

¹³⁵⁶ **P-2246 through P-2312**(Daily reports from 4 Aug to 30 September).

¹³⁵⁷ **P-2159**(Lausic),paras.162-166; **Lausic,T:15369:20-15370:24.**

¹³⁵⁸ Compare for example the daily report of 8 August(**P-2250**) and 9 August(**P-2251**), with reports of the MPs seizing items at checkpoints on the same days(**D-868**). The daily reports contain no information about stolen items having been seized at checkpoints.

¹³⁵⁹ **D-48; D-46; Moric,T:25636:17-23;25731:21-25733:1.**

¹³⁶⁰ **D-267; D-268; D-269; D-844; D-795; D-845; P-878; D-1287.**

¹³⁶¹ **D-426**,pg.12.

809. The evidence demonstrates that given his level in the military hierarchy and the system established for military justice, GOTOVINA acted genuinely and reasonably consistent with his obligations under humanitarian law.

VIII. Individual counts

810. This section sets forth the requisite elements of each of the counts in the Indictment. The evidence fails to prove GOTOVINA's guilt beyond a reasonable doubt on all counts.

A. General requirements of Article 5

811. The general elements of Article 5 are that: (1) there must be an attack; (2) the attack must be directed against a civilian population; (3) the attack must be widespread or systematic; (4) the acts of the perpetrator must be part of the attack; and (5) the perpetrator must know that his or her acts constitute part of a widespread or systematic attack directed against a civilian population.¹³⁶²

812. An attack is defined as a "course of conduct involving the commission of acts of violence."¹³⁶³ An attack may occur as part of an armed conflict¹³⁶⁴ and can "encompass any mistreatment of the civilian population."¹³⁶⁵

813. The Prosecution has failed to prove that there was a widespread or systematic attack "directed against" the Serb civilian population before, during, or after Operation Storm, or that GOTOVINA's acts had any connection with crimes against humanity.

814. The term "directed against" means that the civilian population is the "primary rather than an incidental target of the attack."¹³⁶⁶ To determine whether the civilian population was the "primary object of the attack," the following factors may be considered:

- a. Means and method used in the course of the attack;
- b. Status and number of victims;

¹³⁶² *Popovic*, TJ, para.751; *Blaskic*, AJ, para.98; *Kordic*, AJ, para.99; *Kunarac*, AJ, paras.99,102,105.

¹³⁶³ *Lukic*, TJ, para.873; *Kunarac*, AJ, para.89.

¹³⁶⁴ *Popovic*, TJ, para.874..

¹³⁶⁵ *Kunarac*, AJ, para.86.

¹³⁶⁶ *Kunarac*, AJ, paras.90-91; *Martic*, AJ, para.305.

- c. Discriminatory nature of the attack;
 - d. Nature of the crimes committed in its course;
 - e. Resistance to the assailants at the time; and
 - f. Extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.¹³⁶⁷
815. First, with respect to Operation Storm, “to the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.”¹³⁶⁸
816. The lawful purpose of Operation Storm was to reintegrate the “Krajina” into Croatia, and defend against attacks by the Serbian JCE. Artillery fire and other combat operations were directed against military targets and the means and methods of warfare respected the principles of distinction and proportionality. There was minimal incidental death, injury, or property damage, and no basis whatsoever to conclude that the civilian population was the primary target of the attack. The Prosecution has failed to prove a single unlawful attack, let alone widespread or systematic crimes directed against civilians during Operation Storm. The HV complied with the laws of war under GOTOVINA’s command despite strong resistance from the combined forces of the ARSK-VRS-VJ. The Defence incorporates by reference Sections V.D.i and V.D.ii.
817. Second, crimes committed after Operation Storm cannot constitute a widespread or systematic attack directed against the Serb civilian population. The crime wave resulted from lawlessness during the transition between the RSK’s sudden collapse and the establishment of Croatian State institutions. This crime wave was neither organized nor discriminatory. It was random and

¹³⁶⁷ *Kunarac*,AJ,para.91;*Martic*,AJ,para.305.

¹³⁶⁸ *Kunarac*,AJ,para.91;*Martic*,AJ,para.305.

affected both Croat and Serb property. It was contrary to Croatian State policy and was eventually halted by the authorities.

818. Although “a plan or policy is not a legal element,”¹³⁶⁹ mere multiplicity of random crimes is insufficient unless “they result from a *deliberate* attempt to target a civilian population.”¹³⁷⁰ The crimes must be “at least tolerated by a State, Government or entity ... [S]ome sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy.”¹³⁷¹
819. Similarly, in drafting ICC Rome Statute Article 7 on crimes against humanity, “[m]ost delegations acknowledged that a common crime wave was not a ‘crime against humanity’ in customary international law.”¹³⁷² The ICC Elements of Crimes clarifies that a formal policy is not required insofar as it “may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack.”¹³⁷³ However, “[t]he existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”¹³⁷⁴
820. The evidence does not establish a deliberate failure by Croatian authorities to take action against crimes or a conscious aim to encourage such attacks against civilians or civilian property.

¹³⁶⁹ *Blaskic*, AJ, para. 120; *Kunarac*, AJ, para. 98; *Galic*, TJ, para. 147.

¹³⁷⁰ *Tadic*, TJ, para. 653 (Emphasis added); *Kunarac*, AJ, para. 96; *Limaj*, TJ, para. 194; *Akayesu*, TJ, para. 579.

¹³⁷¹ *Kupreskic*, TJ, paras. 552, 555 (Emphasis added).

¹³⁷² Herman von Hebel and Darryl Robinson, “Crimes within the Jurisdiction of the Court,” in Roy S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (Kluwer Law International, 1999) at pg. 94. See also Daryl Robinson, ‘Elements of Crimes Against Humanity’, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational, 2001), pgs. 67-8, 74-76 (noting clarification of *Kupreskic* by delegates to exclude crimes against humanity based on mere inaction: “[t]hese delegations feared that terms like ‘tolerate’ or ‘acquiescence’ might lead the court to leap from the simple fact of inaction to an inference of a policy, without considering the circumstances surrounding the inaction (e.g. an inability to respond). There was, however, room to discuss ‘passive’ encouragement, provided it was clear that the inaction was deliberate.”)

¹³⁷³ ICC Elements of Crimes, fn. 6.

¹³⁷⁴ *Ibid.*

821. Third, there is no link between the acts of GOTOVINA after Storm and any alleged attack directed against the Serb civilian population.¹³⁷⁵ There is no proof either that GOTOVINA had the intention to commit crimes against humanity or that he made a contribution to the commission of any of the prohibited acts under Article 5.
822. Since there was no attack directed against the Serb civilian population either before, during, or after Storm, Counts 1, 2, 3, 6, and 8 of the Joinder Indictment must fail.

B. Count 1: Persecution

i. Law on persecution focusing on need to prove discriminatory intent

823. The Prosecution has charged GOTOVINA under Articles 7(1) and 7(3) for the crime of persecution. Although persecution is considered to be an “umbrella” crime,¹³⁷⁶ the Prosecution must plead in the indictment the particular acts or omissions which amount to persecution.¹³⁷⁷ The Prosecution has alleged the following underlying acts as the crime of persecution:¹³⁷⁸
- a. Unlawful attacks on civilians and civilian objects;
 - b. Forcible displacement including deportation and forcible transfer;
 - c. Destruction and burning of Serb homes and businesses;
 - d. Plunder and looting of public or private Serb property;
 - e. Murder;
 - f. Other inhumane acts, including shelling of civilians, and cruel treatment;

¹³⁷⁵ *Popovic*, TJ, para.757; *Kunarac*, AJ, paras.99,101.

¹³⁷⁶ *Popovic*, TJ, para.965; *Kupreskic*, AJ, para.98.

¹³⁷⁷ *Popovic*, TJ, para.965; *Blaskic*, AJ, para.139.

¹³⁷⁸ The crime of persecution under Count 1 also includes the crimes charged in Counts 2 through 9. *Jl*, para.59.

- g. Imposition of restrictive and discriminatory measures, including imposition of discriminatory laws;
- h. Discriminatory expropriation of property;
- i. Unlawful detentions; and
- j. Disappearances¹³⁷⁹

824. The Prosecution must prove beyond a reasonable doubt the following elements of crime:

Actus reus:

- (i) Acts or omissions which discriminate in fact and which deny or infringe upon a fundamental right laid down in international customary or treaty law; and

Mens rea:

- (ii) Acts or omissions are carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.¹³⁸⁰

825. This discriminatory intent requirement distinguishes the crime of persecution from other crimes against humanity by requiring that the accused acted with the intent to harm a human being *because* he or she belongs to a particular community or group.¹³⁸¹ This mental element requires a “*dolus specialis*”¹³⁸² of the same “genus” as genocide.¹³⁸³

826. The discriminatory intent must relate to each specific act or omission underlying the charge of persecution.¹³⁸⁴

¹³⁷⁹ *Jl*, para.58; *PTB*, para.126.

¹³⁸⁰ *Nahimana*, AJ, para.985; *Krnjelac*, AJ, para.185 (citing with approval *Krnjelac*, TJ, para.431), reiterated in *Simic*, AJ, para.177; *Stakic*, AJ, paras.327-28; *Kvočka*, AJ, para.320; *Kordic*, AJ, para.101.

¹³⁸¹ *Blagojevic*, TJ, para.583; *Blaskic*, TJ, para.235;

Popovic, TJ, para.968; *Tadic*, AJ, para.305; *Krnjelac*, AJ, para.184..

¹³⁸² *Stakic*, AJ, para.328.

¹³⁸³ *Kupreskic*, TJ, para.636; *Brdjanin*, TJ, para.699.

¹³⁸⁴ *Popovic*, TJ, para.969; *Blagojevic*, TJ, para.584; *Simic*, TJ, para.51.

827. To prove the charge of persecution, there must be no reasonable explanation of the evidence other than the guilt of the accused.¹³⁸⁵ The Prosecution has failed to prove that GOTOVINA committed any crimes with discriminatory intent.
828. Furthermore, it is insufficient to establish that some of GOTOVINA's subordinates may have acted with such intent. Discriminatory intent can be "neither presumed nor 'transferred' from the direct perpetrators" and thus "it is immaterial for the assessment of the intent of the indirect perpetrator whether or not the actor had such a discriminatory intent."¹³⁸⁶

ii. Unlawful attacks on civilians and civilian objects¹³⁸⁷

829. Regarding the Prosecution's allegation that Operation Storm amounted to an "unlawful attack on civilians and civilian objects," the Defence incorporates by reference Sections V.D.i and V.D.ii.
830. The Prosecution has failed to prove that Operation Storm constituted an unlawful attack on civilians and civilian objects. To the contrary, the evidence confirms that, during Operation Storm, GOTOVINA conducted himself lawfully despite exceedingly difficult war-time circumstances. There is no evidence of unlawful shelling, and consistent with GOTOVINA's orders, combat operations and the use of artillery were concentrated on military objectives, resulting in minimal damage to civilians and civilian objects. Accordingly, neither the *actus reus* nor *mens rea* have been met in this case.
831. Furthermore, because the Prosecution has charged "unlawful attacks on civilians and civilian objects" without any particularization,¹³⁸⁸ it must be

¹³⁸⁵ *Martic*, AJ, para.61.

¹³⁸⁶ *Stakic*, AJ, para.329.

¹³⁸⁷ GOTOVINA maintains his objection to the Prosecution's addition of this new charge to the Joinder Indictment: *Motion pursuant to Rule 73 requesting Pre-trial Chamber to strike parts of Prosecution pre-trial brief constituting effective amendment of the Joinder Indictment*, 26 March 2007 (and related filings).

¹³⁸⁸ *PTB*, paras.31-33. Each distinct category of unlawful attacks has differing elements of crime: *Galic*, AJ, para.134; *Kordic*, AJ, para.416; *Strugar*, TJ, para.281. The Prosecution is in effect shifting the burden on GOTOVINA to identify all possible legal bases for a charge of unlawful attacks on civilians and civilian objects. This is a violation of GOTOVINA's fundamental rights under Article 21(4)(a) of the ICTY Statute.

deemed to have charged the specific crime of “direct attack” to the exclusion of indiscriminate or disproportionate attack.¹³⁸⁹

iii. Forcible displacement including deportation and forcible transfer

832. Regarding the Prosecution’s allegation of “forcible displacement,” the Defence incorporates by reference to Sections IV.A, IV.D, and V.
833. The evidence demonstrates that instead of being terrorized into fleeing, the Serb civilian population left because of evacuation orders issued by RSK officials, while others left as a result of fear of Croatia that resulted from years of exposure to anti-Croatian propaganda, in accordance with the Serbian JCE’s opposition to reintegration.
834. Furthermore, there is no evidence that GOTOVINA acted with discriminatory intent. To the contrary, GOTOVINA’s orders before, during, and after Operation Storm demonstrate his intent to protect the Serb civilian population. Accordingly, the Prosecution has failed to meet the *mens rea* standard with respect to this alleged persecutory act.

iv. Wanton destruction and plunder of Serb property

835. Regarding the Prosecution’s allegation of “destruction and burning of Serb homes and businesses” and “plunder and looting of public or private Serb property,” the Defence incorporates by reference to Section V.D.iv.
836. There is no direct evidence that GOTOVINA or any other members of the alleged JCE intended the destruction or plunder of Serb property. The Prosecution relies solely on a circumstantial inference that because the post-liberation crime wave was extensive, it must have been intended or condoned. This assertion is based on a grossly exaggerated scale of criminality. It disregards the alternative reasonable conclusion that the crime wave resulted from lawlessness despite Croatia’s efforts to stop the crime and prosecute perpetrators and despite serious resource limitations. Moreover, the

¹³⁸⁹ *Kordic*,AJ,para.416; *Galic*,TJ,para.41; *Galic*,AJ,para.134; *Strugar*,TJ,para.281.

destruction and plunder affected both Serb and Croat homes¹³⁹⁰ and therefore, was not committed with discriminatory intent.

v. Murder

837. Regarding the Prosecution's allegation of "murder," the Defence incorporates by reference Sections V.D.iv and VIII.E.
838. As with the charges of wanton destruction and plunder, the Prosecution has provided no evidence that GOTOVINA intended or deliberately acquiesced to a single murder charged in the indictment. Additionally, there is insufficient evidence to meet the elements of murder in many alleged incidents. GOTOVINA's lack of knowledge of these crimes, either actual or imputed, makes it impossible for the Prosecution to prove the *mens rea* standard of discriminatory intent.

vi. Other inhumane acts, including shelling of civilians, and cruel treatment

839. Regarding the Prosecution's allegation of "inhumane acts" and "cruel treatment," the Defence incorporates by reference Sections V.D. and VIII.F.
840. The Prosecution has failed to provide any evidence of sufficient gravity to constitute cruel treatment or inhumane acts. Furthermore, there is no evidence that any of GOTOVINA's subordinates were involved in mistreating the Serb population.

vii. Imposition of restrictive and discriminatory measures, including imposition of discriminatory laws

841. Regarding the Prosecution's allegation of "imposition of discriminatory measures," the Defence incorporates by reference Section V.D.v.
842. The Prosecution has notified the Defence of only one law which it claims is discriminatory, namely the *Temporary Takeover of Property Law*.¹³⁹¹ The Prosecution claims that it was intended to deny Serbs the possibility of

¹³⁹⁰ [REDACTED] P-141,pg.1; D-1327.
¹³⁹¹ POS,T:431:12-432:8;98bis,T:18148:4-5

returning to Croatia by reallocating their homes to Croats.¹³⁹² This argument is without merit. Even GALBRAITH believed that at least 80% of the Serbs who left would not want to return,¹³⁹³ and it was thus unreasonable to expect Croatia to have done anything else given the urgent need to provide temporary shelter for tens of thousands of returning IDPs.

843. Furthermore, even the European Court of Human Rights has held that this legislation did not violate international law.¹³⁹⁴
844. This view is further supported by international tribunal jurisprudence.¹³⁹⁵ Even though Croatia was not responsible for the expulsion of Serbian civilians from the “Krajina,” it was not under an obligation to allow their immediate or unconditional return.¹³⁹⁶

viii. Discriminatory expropriation of property

845. Discriminatory expropriation of property is similar to the charge of plunder with the additional requirement of discriminatory intent.¹³⁹⁷ Accordingly, the Defence incorporates its prior arguments relating to plunder. Furthermore, since both Serb and Croat homes were indiscriminately plundered after Operation Storm,¹³⁹⁸ the Prosecution has failed to prove the *mens rea* of the crime of discriminatory expropriation of property as a crime of persecutions.¹³⁹⁹
846. The Prosecution also claims that the *Temporary Takeover of Property Law* amounts to an illegal expropriation of the property of Serbs who left. First, the Prosecution has not proven its allegations beyond reasonable doubt. One reasonable explanation of the evidence is that the law was intended to

¹³⁹² POS,T:431:12-432:8;444:10-15;**98bis**,T:18148:4-15
¹³⁹³ P-458,pg.46.
¹³⁹⁴ *Saratic.v. Croatia*,ECHR,24Oct.2006.
¹³⁹⁵ *EECC*,paras.55,82.
¹³⁹⁶ *EECC*,paras.55,82
¹³⁹⁷ *Kupreskic*,TJ,para.631.
¹³⁹⁸ See Section V.D.iv.5.(c).
¹³⁹⁹ *Blaskic*,TJ,paras.227,233.

temporarily manage abandoned property, without affecting the right to ownership of the property.¹⁴⁰⁰

847. Second, even assuming *arguendo* that the law was intended as an indefinite restriction on ownership, the Prosecution has failed to establish that such a restriction was illegal under international law. The evidence demonstrates that Serbs who fled the “Krajina” during and after Storm were not citizens of Croatia, but rather citizens of the RSK and FRY,¹⁴⁰¹ a state against which Croatia was in a state of armed conflict throughout the indictment period.¹⁴⁰² Under international law, a State has a right to freeze or otherwise control or restrict the resources of enemy nationals so as to deny them to the enemy State.¹⁴⁰³ Accordingly, the Prosecution has failed to prove that the *Temporary Takeover of Property Law* violated international law.

ix. Unlawful detentions

848. Regarding the Prosecution’s allegation of “unlawful detentions,” there is no evidence to support this charge. The Defence incorporates by reference Section V.D.iv.7.
849. Although unlawful detention may involve the organized detention of civilians,¹⁴⁰⁴ the overwhelming evidence shows that Serbs were not unlawfully detained by Croatian authorities during or after Operation Storm.
850. In accordance with the Geneva Conventions, both Serb and Croat civilians were taken to reception centers from the liberated territories,¹⁴⁰⁵ which demonstrates that Serbs were not targeted on the basis of their ethnicity.¹⁴⁰⁶ People were taken to the reception centers for their own safety, because the area was still a combat zone, and there was no water, telephone or electricity

¹⁴⁰⁰ **D-1911**(Bagic),pg.3.
¹⁴⁰¹ **D-1761; Granic**,T:24716:15-24719:23;24677:10-25;24713:19-24714:9;24714:22-24715:8
¹⁴⁰² **Stipulation**
¹⁴⁰³ **EECC**,para.127.
¹⁴⁰⁴ **Blaskic**,TJ,para.234.
¹⁴⁰⁵ **P-1045, Ilic**,T:7579:16-7580:16; **D-1727**.
¹⁴⁰⁶ **D-1727; D-1723**(Cipci),para.10.

in the area during the hottest days of summer.¹⁴⁰⁷ Moreover, civilians in the liberated territories had not obtained proper Croatian documentation, and the reception centers were therefore used to identify people and issue Croatian identity documents.¹⁴⁰⁸

x. Disappearances

851. With respect to “disappearances,” the Prosecution has offered no credible evidence in support of this allegation. To the extent that “disappearances” refers to Serbs who were allegedly murdered or forcibly displaced, the Defence incorporates by reference Sections V.D.iii and VIII.E.

C. Counts 2 and 3: Deportation and forcible transfer

i. Law on deportation and forcible transfer

852. The Prosecution charges that GOTOVINA intended to deport or forcibly transfer the Serb civilian population through unlawful shelling and the use of Psy-Ops.¹⁴⁰⁹ The Prosecution contends that the Brioni Meeting participants agreed to drop leaflets “to get the civilian population to flee.”¹⁴¹⁰ The Prosecution alleges that the vast majority of the Serb population was deported to Bosnia and Serbia as a result of unlawful shelling during Operation Storm.¹⁴¹¹
853. With respect to the “small fraction” of the Serb population that remained in Croatia after Operation Storm, the Prosecution claims that they were arrested by the HV and taken to “collection centres” where they were systematically deported out of Croatia.¹⁴¹² Even if Serb civilians left Croatia willingly, the Prosecution claims that their departure was rendered involuntary by the

¹⁴⁰⁷ **Lausic**,T:15395:13-15395:5; **Juric**,T:27451:10-27452:2; **Cipci**,T:23113:20-24;23115:25-23116:17; **D-336**(Video of BOUCHER warning a woman that there is no water, electricity or telephone).

¹⁴⁰⁸ **D-67**; **Milan Ilic**,T:7579:16-7580:16.

¹⁴⁰⁹ **Jl**,para.28; **PTB**,para.36; **POS**,T:418:8-419:2;440:17-25;443:23-25.

¹⁴¹⁰ **POS**,T:446:19-21;**98bis**,T:17384:14-18;**PTB**,para.36.

¹⁴¹¹ **PTB**,para.14; **Jl**,para.49.

¹⁴¹² **PTB**,para.115.

subsequent burning and looting of homes, expropriation of property, and other forms of discrimination.¹⁴¹³

854. The elements of the crimes of forcible transfer and deportation are substantially similar.¹⁴¹⁴ Forcible transfer and deportation are defined as: (i) the forced displacement of persons by expulsion or other forms of coercion; (ii) from an area in which they are lawfully present; (iii) without grounds permitted under international law (*actus reus*).¹⁴¹⁵ While forcible transfer may be carried out within national boundaries, for the crime of deportation, the displacement of the persons must be across a *de jure* border between two states or, in certain circumstances, a *de facto* border.¹⁴¹⁶
855. In the case of deportation, not only must the victims end up across a border but it must be the act of the accused which determines that destination.¹⁴¹⁷ It is not sufficient to prove force on the part of the accused and the ultimate location of the victims across a border.¹⁴¹⁸ The Prosecution must establish a link between these two elements.¹⁴¹⁹ As the *Popovic* Trial Chamber stated:

To do otherwise is to leave a constituent element of the crime related not to the acts of the accused but to chance or, in many cases, to a choice made by the victim. This cannot be consistent with the concept of *actus reus* of a crime.¹⁴²⁰

856. There is also a distinct *mens rea* for the two crimes.¹⁴²¹ In the case of forcible transfer, as the ultimate location does not form part of the elements of the offence, the *mens rea* is established with proof of the intent to forcibly displace the person.¹⁴²² In the case of deportation, as displacement across a border is a constituent element, the *mens rea* for the offence must encompass this component of the crime.¹⁴²³ Thus, the Prosecution must establish that the

¹⁴¹³ PTB, para.116.

¹⁴¹⁴ *Popovic*, TJ, para.890.

¹⁴¹⁵ *Popovic*, TJ, para.891; *Krajisnik*, AJ, para.304; *Stakic*, AJ, paras.278,317.

¹⁴¹⁶ *Stakic*, AJ, paras.278,289-300.

¹⁴¹⁷ *Popovic*, TJ, para.893.

¹⁴¹⁸ *Popovic*, TJ, para.893.

¹⁴¹⁹ *Popovic*, TJ, para.893.

¹⁴²⁰ *Popovic*, TJ, para.893.

¹⁴²¹ *Popovic*, TJ, para.904.

¹⁴²² *Popovic*, TJ, para.904; *Stakic*, AJ, para.317.

¹⁴²³ *Popovic*, TJ, para.904.

accused intended to displace the victims across a *de jure* or *de facto* border.¹⁴²⁴

857. The Prosecution has failed to prove the charges of deportation and forcible transfer for several reasons.
858. First, even if the evidence showed that displacement resulted directly from artillery shelling (which it does not), there is no proof that Operation Storm consisted of unlawful attacks against civilians or civilian objects. Displacement resulting from lawful combat is not “without grounds permitted under international law” as required.¹⁴²⁵ If displacement resulting from lawful combat is criminalized, then humanitarian law would become meaningless.¹⁴²⁶
859. Second, the large-scale displacement of the population was the direct result, not of combat operations, but of the RSK evacuation orders and attendant anti-Croat propaganda.¹⁴²⁷ The Serbian JCE was determined not to leave the population behind, consistent with its ideology that Serbs were only safe in an ethnically pure State. Thus, with respect to what the Prosecution admits is the overwhelming majority of Serb departures, there is no proof of either the *mens rea* or *actus reus* of forced displacement. There is no connection between GOTOVINA’s conduct and the war-time departure of civilians.
860. Third, because of the requirement of control over territory, the displacement of the vast majority of Serbs falls outside deportation and forcible transfer because they left prior to the arrival of the HV. Article 49 of Geneva Convention IV is “the underlying instrument prohibiting deportation.”¹⁴²⁸ The *actus reus* “does not differ whether perpetrated as a war crime or as a crime against humanity.”¹⁴²⁹ It requires forcible displacement from territory under

¹⁴²⁴ *Popovic*, TJ, para. 904; *Stakic*, AJ, paras. 278, 300.

¹⁴²⁵ *Stakic*, AJ, para. 278.

¹⁴²⁶ **NATO Report**, para. 52: “where individual (and legitimate) attacks on military objectives are concerned, the mere cumulation of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime.” William Fenrick, *Crimes in Combat: The Relationship between Crimes against Humanity and War Crimes*, 5 March 2004, pg. 11: “We do not contribute to the viability of IHL by indulging in creative reclassification so that an act which is regarded from one perspective as lawful can be regarded as unlawful because we changed the label [i.e. from war crimes to crimes against humanity].”

¹⁴²⁷ *Popovic*, TJ, para. 893.

¹⁴²⁸ *Stakic*, AJ, para. 306.

¹⁴²⁹ *Krnjelac*, TJ, para. 473 (Emphasis added).

the actual control of an opposing belligerent.¹⁴³⁰ Judge Schomburg has clarified that deportation requires forced displacement of an individual “from an area *under the actual control* of one belligerent party to an area under the actual control of another *de jure* or *de facto* authority.”¹⁴³¹ Therefore, any displacement of the Serb population prior to the liberation of “Krajina” by the HV cannot constitute deportation or forcible transfer.

861. Fourth, there was no policy of expulsion of the few Serb civilians that remained after Operation Storm. International law recognizes certain grounds permitting forced displacement.¹⁴³² In accordance with the Geneva Conventions, the Croatian government housed Serb and Croat civilians temporarily in reception centers for their own security. This displacement was temporary and carried out in such a manner as to ensure that Serb and Croat civilians returned to their homes as soon as the situation allowed.¹⁴³³ The evidence demonstrates that Serbs were released from reception centers *en masse* beginning on 10 August,¹⁴³⁴ coinciding with the conclusion of active hostilities in the “Krajina,” and by mid-September all but those incapable of caring for themselves were released, with none transferred out of Croatia.¹⁴³⁵ International organizations, including the ICRC, had access to the centers and reported favorably on conditions. Serb civilians who chose to leave Croatia after Operation Storm did so voluntarily. Furthermore, the evidence

¹⁴³⁰ *Krnojelac*, AJ, para.220: In determining which acts of displacement are considered Article 5 crimes under customary law:

The Geneva Conventions are considered to be the expression of customary international law. Article 49 of the Fourth Geneva Convention prohibits displacement to another state, within or from occupied territory. It provides that: “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” Moreover, Article 85 of Additional Protocol I prohibits “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory in violation of Article 49 of the Fourth Convention.” Furthermore, Article 17 of Additional Protocol II to the Geneva Conventions explicitly prohibits the forced displacement of the population within or outside a country in which an internal armed conflict has broken out.

¹⁴³¹ *Naletilic*, AJ, *Separate and Partially Dissenting Opinion of Judge Schomburg*, para.22 (Emphasis added).

¹⁴³² *Stakic*, AJ, para.284; Article 49(2) of Geneva Convention IV; Article 17(1) of Additional Protocol II.

¹⁴³³ *Popovic*, TJ, para.901.

¹⁴³⁴ **P-31**; *Flynn*, T:1366:2-21.

¹⁴³⁵ **P-2357**; *Kardum*, T:9340:13-23; *Zidovec*, T:19907:9-22.

demonstrates that no Serb was transferred from a reception centre to a location outside Croatia.¹⁴³⁶

862. Fifth, even assuming *arguendo* that there was a post-liberation policy of expulsions, GOTOVINA was not involved in shaping or participating in the execution of such a policy after Operation Storm, nor is there any evidence that he knew or should have known of it. As an operational commander in Bosnia, GOTOVINA continued combat operations after Operation Storm and had no role in maintaining law and order in Croatia.
863. Sixth, plunder or destruction of property, or discriminatory measures, cannot retroactively constitute deportation or forcible transfer if there is no forcible displacement *ab initio*.¹⁴³⁷ With no *actus reus*, the charge has not been proven.
864. Seventh, Croatia did not create obstacles to the return of Serbs¹⁴³⁸ through plunder and destruction of their property and other discriminatory measures.¹⁴³⁹ While most Serbs who fled Croatia had no intention of returning, the Croatian government did not undertake to prevent the return of all Serbs, but rather was opposed to their *mass return* until relations normalized with the FRY, a position entirely consistent with international law. The Defence incorporates by reference arguments in Section V.D. of this Brief.
865. Eighth, although Croatia did not expel Serbs, it would have been within its rights under humanitarian law to expel enemy nationals during armed conflict.¹⁴⁴⁰ To the extent that FRY-RSK citizens were denied immediate re-entry into Croatia during ongoing hostilities, this would have been clearly permissible under international law.¹⁴⁴¹

¹⁴³⁶

P-2357.

¹⁴³⁷

Popovic,TJ,para.893.

¹⁴³⁸

PTB,para.46.

¹⁴³⁹

PTB,para.116.

¹⁴⁴⁰

EECC,paras.55,82.

¹⁴⁴¹

EECC,paras.55,82.

866. Thus, even though Croatia was not responsible for the expulsion of Serb civilians from the “Krajina,” it was not under an obligation to allow their immediate or unconditional return.

867. For these reasons, the Prosecution has failed to prove that GOTOVINA is responsible for deportation or forcible transfer and the Trial Chamber should enter an acquittal on these counts.

D. Counts 4 and 5: Plunder and wanton destruction

i. Law on plunder and destruction of property

868. Plunder and wanton destruction are charged under Article 3 in Counts 4 and 5, as well as persecutory acts under Article 5(h) in Count 1. The elements of wanton destruction under Article 3 are as follows:

Actus reus

- (i) The destruction of property must occur on a large scale;
- (ii) The destruction must not be justified by military necessity; and

Mens rea

- (iii) The perpetrator must act with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.¹⁴⁴²

869. The crime of plunder under Article 3 is committed “when private or public property is appropriated intentionally and unlawfully.”¹⁴⁴³ The property must be sufficiently valuable to entail grave consequences for the victim.¹⁴⁴⁴ The *mens rea* element of the offence of plunder of public or private property is established when the perpetrator of the offence acts with the knowledge and intent to acquire property unlawfully, or when the consequences of his actions are foreseeable.¹⁴⁴⁵

¹⁴⁴² *Kordic*, AJ, para. 74.

¹⁴⁴³ *Kordic*, AJ, para. 84; *Hadzihasanovic*, TJ, para. 49.

¹⁴⁴⁴ *Martić*, TJ, para. 103; *Celebici*, TJ, para. 1154.

¹⁴⁴⁵ *Martić*, TJ, para. 104; *Hadzihasanovic*, TJ, para. 50.

870. In certain circumstances, belligerents may lawfully use private or public property in the occupied territory for their military needs.¹⁴⁴⁶ Exceptions to the principle of protection of public or private property include property seized as war booty, requisitioned, or whose seizure is justified by necessity.¹⁴⁴⁷
871. In accordance with international law, and pursuant to domestic regulations, the HV was authorized to seize enemy property that can be used for military purposes which was captured or found on the battlefield as war booty, with the exception of personal belongings of prisoners of war.¹⁴⁴⁸ Public or private property which may also be considered war booty includes weapons, ammunition, equipment, any materials with military applications, communications equipment, vehicles, and other means of transportation (including horses), as well as cash, funds and securities belonging to the enemy state.¹⁴⁴⁹ Such property must be handed over to the competent authorities and registered.¹⁴⁵⁰
872. According to international law, the regulations do not allow arbitrary and unjustified plunder for army purposes or for the individual use of army members, even if the property seized can be used collectively or individually.¹⁴⁵¹
873. The Defence incorporates by reference Section V.D.iv. Croatian government institutions did not plan, instigate, order, commit, aid or abet, or in any other way act with the intent to destroy and loot Serbian property. A crime wave existed affecting Croatian and Serbian property alike perpetrated by various types of people acting on their own. Furthermore, the central piece of Prosecution evidence, an UNMO assessment of damage to allegedly Serbian property, is not credible and conflicts with other record evidence in this case. Although not responsible for law and order in sovereign Croatia, GOTOVINA

¹⁴⁴⁶ *Martić*, T.J., para.102; *Hadžihasanović*, T.J., para.51. According to the Hague Regulations, forcible contribution of money, requisition for the needs of the occupying army, and seizure of material obviously related to the conduct of military operations, are lawful in principle.

¹⁴⁴⁷ *Hadžihasanović*, T.J., para.56.

¹⁴⁴⁸ *Martić*, T.J., para.102; *Hadžihasanović*, T.J., paras.27,52; Article 94 of the 1988 SFRY Armed Forces Regulations; P1113, pgs.195-196; 235-237.

¹⁴⁴⁹ P1113, pgs. 235-237; *Hadžihasanović*, T.J., para.52.

¹⁴⁵⁰ P1113, pgs. 235-237; *Hadžihasanović*, T.J., para.52.

¹⁴⁵¹ P-1113, pgs.235-237; *Hadžihasanović*, T.J., para.52.

took all necessary and reasonable measures available prior to, during, and after Operation Storm to address concerns of subordinate units' involvement in destruction of property and looting. GOTOVINA also ordered the registration of all war booty. Although some HV members did engage in looting, the HV MP checkpoints seized "most" of these stolen items.¹⁴⁵²

E. Counts 6 and 7: Murder

i. Prosecution's allegations

874. The Prosecution argues that, from the beginning of Operation Storm to 30 September 1995, hundreds of civilians and persons taking no active part in the hostilities were killed by Croatian soldiers and other subordinates of GOTOVINA.¹⁴⁵³

ii. Background: Procedural history of murder charges

875. Throughout these proceedings, the Prosecution has not met even the minimum proof required for murder before leveling such serious charges. The Prosecution initially alleged 245 cases of murder. After months of investigation and trial, the Defence demonstrated that at least 70 cases were duplicates, occurred outside the geographical and temporal scope of the indictment, or were unsupported by any evidence.¹⁴⁵⁴ On 17 July 2008, the Prosecution unilaterally filed a "further clarification" to the indictment, removing 59 cases, but adding 189 new murder allegations.¹⁴⁵⁵

876. Following the Rule 98 *bis* hearing, the Prosecution again conceded there was no evidence of murder for 32 of these new allegations.¹⁴⁵⁶

877. There are now 343 alleged murders between the Joinder Indictment Schedule Killings and the Further Clarification Schedule ("FC"). Among these,

¹⁴⁵² P-1134,pg.4.

¹⁴⁵³ PTB,para.123; POS,T:466:1-15; 98bis,T:17415:9-18.

¹⁴⁵⁴ *Joint Defence Reply to the Prosecution Response to Joint Defence Appeal Against Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims*, 5 December 2008, para.19. Please note that, prior to the commencement of trial, the GOTOVINA Defence informed the Prosecution that in two instances it had identified killing victims who were actually alive. *Prosecutor v. Gotovina*, IT-01-45-I, Indictment, First Schedule, Killing Incident no. 15, 21 May 2001. These two victims were dropped from the JI, Schedule, 21 July 2006.

¹⁴⁵⁵ *Further Clarification of Identity of Victims*, 17 July 2008.

¹⁴⁵⁶ *Prosecution's Notification Regarding Murder Victims*, Annex, A, 27 March 2009.

however, the incidents charged have such a broad temporal and geographical scope that no discernible pattern may be inferred. Most significantly, there are generally no eyewitnesses and little if any record evidence to corroborate murder allegations or link the crime to GOTOVINA's subordinates.

878. As more fully discussed below, the charged murders are random and isolated, lack conclusive evidence of involvement by GOTOVINA's subordinates, and in many cases, were investigated and/or prosecuted by Croatian authorities. In view of these facts, Counts 6 and 7 fail in their entirety. This applies to all modes of liability alleged, including Article 7(1) JCE; Article 7(1) planning, instigating, ordering, committing, and/or aiding and abetting; and Article 7(3) command responsibility. Furthermore, with no proof linking GOTOVINA to any of these murders, there is no proof that, where his subordinates were possibly involved, he failed to take necessary and reasonable measures.

iii. Law on murder

879. A conviction for murder requires proof beyond a reasonable doubt of the intentional killing of a person taking no active part in hostilities.¹⁴⁵⁷ The death must have been caused by an act or omission of the accused, or of a person for whom the accused is criminally responsible.¹⁴⁵⁸ The accused must have intended to kill, or to willfully cause serious injury in reckless disregard of human life.¹⁴⁵⁹ Additionally, the Prosecution must show that the perpetrator was aware that the victim was taking no active part in hostilities.¹⁴⁶⁰
880. Proof of death does not require proof that a victim's body was found.¹⁴⁶¹ Murder may be shown by circumstantial evidence providing, however, that "the only reasonable inference from the evidence is that the victim is dead as a result of acts or omissions of the accused or of one or more persons for whom the accused is criminally responsible."¹⁴⁶² Thus "[w]hen there is more than

¹⁴⁵⁷ *Kvočka*, AJ, para.261; *Strugar*, TJ, para.236; *Lukic*, TJ, para.903.

¹⁴⁵⁸ *Kvočka*, AJ, para.261; *Lukic*, TJ, para.903.

¹⁴⁵⁹ *Kvočka*, AJ, para.261; *Lukic*, TJ, para.903.

¹⁴⁶⁰ *Halilovic*, TJ, para.36; *Milutinovic*, TJ, Vol.1, para.134.

¹⁴⁶¹ *Halilovic*, TJ, para.37; *Lukic*, TJ, para.903.

¹⁴⁶² *Kvočka*, AJ, para.260; *Halilovic*, TJ, para.37; *Lukic*, TJ, para.904.

one conclusion reasonably open on the evidence, it is not for this Trial Chamber to draw the conclusion least favourable to the accused.”¹⁴⁶³

881. For the crime of murder, ICTY jurisprudence requires an exacting standard of proof. For example, in *Milutinovic* the Trial Chamber found that where a witness overheard an assault on his neighbours (saw their house set on fire, saw soldiers chasing them, heard shots fired, and was later told by someone else that they had been killed), the allegation was not proven because the evidence was not based on direct personal observation.¹⁴⁶⁴ In another incident, also *Milutinovic*, a witness testified that he saw many corpses with bullet wounds in the streets during an attack on a town, witnessed many types of armed forces burn and loot, but did not witness any actual shootings. This indirect evidence was deemed insufficient to establish the cause of death and thus to sustain a conviction for murder.¹⁴⁶⁵
882. In *Halilovic*, the murder of a woman was not proven beyond a reasonable doubt where the evidence was that her barn had caught fire, that witnesses had seen ABiH soldiers in the vicinity of the barn, and that her husband later claimed to have found her remains inside of it.¹⁴⁶⁶
883. Thus while evidentiary inferences may be employed to prove murder, such inferences must necessarily demonstrate all of the constituent elements of the crime beyond a reasonable doubt.
884. Regarding the requirement that the victim must not have been taking active part in hostilities, this must be determined on a case-by-case basis. Persons taking active part in hostilities include both soldiers and civilians engaged in acts likely to cause direct harm to the enemy.¹⁴⁶⁷ Evidence must therefore be adduced regarding the “specific situation of the victim at the moment the crime was committed” to establish relevant factors such as “the activity [of the victim], whether or not the victim was carrying weapons, [and the] clothing,

¹⁴⁶³ *Tadic*, TJ, para.240.

¹⁴⁶⁴ *Milutinovic*, TJ, vol.2, paras.126-127,146.

¹⁴⁶⁵ *Milutinovic*, TJ, vol.2, paras.128,147 (there was also evidence of KLA groups operating in the area, and thus it may have been the result of a counter-operation).

¹⁴⁶⁶ *Halilovic*, TJ, para.603-604.

¹⁴⁶⁷ *Halilovic*, TJ, paras.32-34, fn.75.

age and gender of the victims at the time of the crime.”¹⁴⁶⁸ Knowledge of the victim’s status is part of the requisite *mens rea* and the Prosecution must show that in the given circumstances, a reasonable person could not have believed that the individual attacked was a combatant.¹⁴⁶⁹

885. Next, the conduct causing death must have been “unlawful.”¹⁴⁷⁰ Thus, a lawful attack against a military objective that complies with international humanitarian law cannot qualify as murder, even if there are incidental civilian casualties.¹⁴⁷¹

iv. No mode of liability applies to Gotovina

886. Even had the Prosecution sufficiently proven all elements of murder in some alleged incidents, the Prosecution failed to establish a mode of liability inculpatory GOTOVINA.

887. No JCE mode of liability applies to GOTOVINA. The Prosecution has failed to prove that GOTOVINA participated in either a JCE I to commit persecutory killings or a JCE III to commit murder. The Defence incorporates by reference Chapter V. JCE extended liability only applies if the Prosecution can establish a common criminal purpose.¹⁴⁷² As set forth in Section V.C., this requirement has not been met.¹⁴⁷³

888. Regarding other 7(1) modes of liability, GOTOVINA did not plan, instigate, order, commit and/or aid and abet the murder of “Krajina” Serb civilians. The Prosecution has failed to introduce any evidence that GOTOVINA: (1) planned or designed, at the preparatory and execution phases, the murder of “Krajina” Serb civilians;¹⁴⁷⁴ (2) prompted others to commit the murder of “Krajina” Serb civilians;¹⁴⁷⁵ (3) instructed another person to commit

¹⁴⁶⁸ *Halilovic*, TJ, para.34; *Galic*, TJ, para.50.

¹⁴⁶⁹ *Halilovic*, TJ, para.36; *Milosevic*, AJ, para.60; *Kordic*, AJ, para.48; *Blaskic*, AJ, para.111.

¹⁴⁷⁰ *Kupreskic*, TJ, para.560.

¹⁴⁷¹ *Kupreskic*, TJ, para.701. See *Legality of the threat or use of Nuclear Weapons*, ICJ Advisory Opinion, 8 July 1996, para.75 (during armed conflict, the prohibition against “arbitrary deprivation of life” is determined by “the applicable *lex specialis*, namely, the law applicable in armed conflict).

¹⁴⁷² *Tadic*, AJ, paras.227-228.

¹⁴⁷³ Additionally, the OTP has failed to meet its burden of proof that GOTOVINA participated in a JCE.

¹⁴⁷⁴ *Mrksic*, TJ, para.548.

¹⁴⁷⁵ *Mrksic*, TJ, para.549.

murder,¹⁴⁷⁶ or (4) made any contribution, let alone a substantial contribution, to the commission of any murders charged in the indictment.¹⁴⁷⁷ To the contrary, GOTOVINA consistently took actions to increase discipline in his subordinates. The Defence incorporates by reference Section VII.F.

889. Accordingly, counts 6 and 7 fail in their entirety under these Article 7(1) modes of liability.
890. Regarding 7(3) liability, the Prosecution has failed to introduce any evidence that GOTOVINA had any notice that murders had been committed by his subordinates. Furthermore, the Prosecution has failed to prove that GOTOVINA had effective control over perpetrators or failed to take necessary and reasonable measures to prevent and punish the crime of murder. The Defence incorporates by reference Sections VII.D, VII.E and VII.F.
891. In all cases, bodies in the liberated areas were recovered by sanitation teams which had MUP crime technicians in their composition. Moreover, in most cases when a body was discovered it was reported to a MUP police station for further action. For example, the Sibenik Police Administration routinely performed investigations and involved the responsible investigative judge and County Prosecutor's office when a body was discovered in the liberated territory.¹⁴⁷⁸
892. If the Kotar Knin Police Administration did not perform its investigative obligations properly, this in no way is attributable to GOTOVINA.¹⁴⁷⁹

v. **Analysis of murder evidence**

893. The Prosecution's 343 alleged murders occurred from 4 August until 29 September 1995 across a vast and open geographic area. When analyzing the evidence submitted by the Prosecution in purported support of these alleged incidents, many flaws emerge.

¹⁴⁷⁶ *Mrksic*, TJ, para.550.

¹⁴⁷⁷ *Mrksic*, TJ, paras.551-552.

¹⁴⁷⁸ **D-1783**(31 August 1995 Report from Sibenik Crime Police to the Sibenik County Prosecutor's Office); **D-2158 through D-2168**; **D-1396**; **D-1397**; **D-1398**(reports showing investigative judges called when bodies are found in the Sibenik PA).

¹⁴⁷⁹ *Popovic*, TJ, para.1046, citing: *Boskoski*, TJ, para.536; *Boskoski*, AJ, paras.231,234,268,269,270; *Hadzihanovic*, TJ, para.175; *Strugar*, TJ, para.376; *Krnojelac*, TJ, para.127; *Krstic*, AJ, para.143, fn.250.

894. Among them are at least 4 duplications,¹⁴⁸⁰ one person who died before Operation Storm,¹⁴⁸¹ one who died in Bosnia,¹⁴⁸² at least two who were killed by the ARSK,¹⁴⁸³ another who died in 2002,¹⁴⁸⁴ incidents that occurred in areas under RSK control or where there was active combat,¹⁴⁸⁵ and incidents that occurred in the Gospic MD and the AOR of forces not in the Split MD.¹⁴⁸⁶
895. Additionally, in many cases the only record evidence on key legal elements comes from unverifiable hearsay statements within reports such as the "Military Operation Storm and its Aftermath" published by the Croatia Helsinki Committee in 2001 as well as the reports of UN affiliated groups such as HRAT, UNCIVPOL and UNMO.
896. These reports are often based on underlying daily incident reports not always in evidence or even available to the parties, which themselves may have been based on pure hearsay. Most often, the identity of the alleged witness is unknown.¹⁴⁸⁷ Indeed, it is impossible to discern the accuracy of the information in these reports, precluding the Chamber from relying upon them as proof that a particular incident was a murder.¹⁴⁸⁸
897. Furthermore, there is often neither proof of the date of death nor a discernable system used by the Prosecution in alleging a date of death. In many instances the alleged date of death coincides with the sanitation date of the body. In other cases, the alleged date of death coincides with Croatian death records.¹⁴⁸⁹ Rarely is there any corroborated evidence of the actual date of

¹⁴⁸⁰ FC79 is likely a duplicate of FC48. FC133 and 134 are duplications of alleged murder victims in SK3. FC306 appears to be a duplication of FC305.

¹⁴⁸¹ FC220 died prior to Operation Storm; **D-1986**.

¹⁴⁸² FC291 died in Grahovo, Bosnia; **P-2139**.

¹⁴⁸³ FC334 and FC335 resulted in an indictment against a member of the ARSK; **D-2023**; **D-347**.

¹⁴⁸⁴ FC57 was still alive in 2002; **Puhovski,T:16062:25-16064:22**; **D-1314**,pgs.5-6.

¹⁴⁸⁵ See Appendix D (map showing areas of combat and murder instances).

¹⁴⁸⁶ See Appendix C (map showing murders in Gospic MD and MUP AOR).

¹⁴⁸⁷ **Puhovski,T:15926:2-10**.

¹⁴⁸⁸ **Kvočka,AJ,para.260-261**;**Galic,TJ,para.150**;**Halilovic,TJ,para.36**;

Milutinovic,TJ,vol.I,para.134.

¹⁴⁸⁹ The Croatian death records in some instances may have been back-dated based on assumptions that bodies discovered died in combat despite the body being discovered at a much later date. There are several examples where this may be the case. See, e.g. **P-2044,pg.2**; **P-1363**; **P-2047,pg.1**; **P-1368**. Further, because these are bureaucratic records, the information therein may not always be based on an investigation.

death, making any effort by the Prosecution to argue the alleged perpetrators's identity by inference even more tenuous.

vi. Schedule to Joinder Indictment Killing Incidents

898. The schedule to the JI identifies ten killing incidents. Each incident will be examined in turn. A full analysis of the evidence demonstrates that GOTOVINA is not criminally responsible for any of these incidents.

1. SK 1

899. On 5 August approximately 22-24 individuals boarded Mile DRAGICEVIC's tractor and another vehicle to evacuate on instructions from RSK authorities.¹⁴⁹⁰ At least five members of the ARSK, [REDACTED] were among this group.¹⁴⁹¹ At least one ARSK member was armed.¹⁴⁹²

900. [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED] Three people were killed: Mile DRAGICEVIC, Nikola DRAGICEVIC and Sava CEKO.¹⁴⁹⁷

901. In the midst of combat activities on the day the HV took Knin, the chaotic circumstances in this incident show no intent to kill non-combatants. This absence of criminal *mens rea* was demonstrated by the HV members' actions immediately thereafter.

902. [REDACTED]
[REDACTED] [REDACTED]

1490 [REDACTED]
1491 [REDACTED]
1492 [REDACTED] P-2684(Dusan Dragicevic),para.9.
1493 [REDACTED] D-778; P-2684(Dusan Dragicevic),para.10.
1494 [REDACTED] D-782.
1495 [REDACTED]
1496 [REDACTED]
1497 [REDACTED] P-864; P-866; P-868.
1498 [REDACTED]

[REDACTED]

903. Moreover, additional ARSK members were stopped and apprehended at this checkpoint,¹⁵⁰¹ corroborating the HV's intent to control movement and prevent ARSK soldiers escaping or reinforcing their units, not to attack non-combatants.
904. There is no evidence that GOTOVINA had any involvement in or notice of this event. Scheduled Killing 1 ("SK1") was an unfortunate "fog of war" incident which regrettably resulted in the loss of life. There is no basis to conclude that this was an act of murder.

2. SK 2

905. Sava DURIC was allegedly killed in the village of Djurici, Knin Municipality on 6 August 1995.¹⁵⁰²
906. Narratives relating to this alleged incident were provided solely through hearsay evidence¹⁵⁰³ attributed to DURIC's elderly mother, Milka DURIC, and by DURIC's son, Mile DURIC, whose highly questionable evidence was provided to the Prosecution only after the death of Milka DURIC.¹⁵⁰⁴
907. Until 25 September 2004, the only alleged eyewitness was Sava DURIC's mother, Milka DURIC.¹⁵⁰⁵ The Prosecution never obtained a witness statement from Milka DURIC and no direct statement from her was admitted into evidence.
908. Milka DURIC's earliest recorded hearsay statement is in a 26 August 1995 UNCIVPOL report which records that, while in a shelter with her neighbors, at approximately 18.00 hrs on 6 August 1995 she heard a sound on the roof of the home. Upon exiting the shelter, she found the house ablaze and claimed

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2402,pgs.45-46.

1504

1505

[REDACTED]

P-2684(Dusan Dragicevic),para.6.

PTB,para.124.

D-397(Milica Duric); P-1004(Milica Duric); P-239; P-2513(Romashev),pg,11; P-

P-436(Mile Duric).

P-436(Mile Duric).

that her paralyzed then-53 year old son was in the burning home.¹⁵⁰⁶ She made no mention of HV involvement.

909. Milka DURIC's next hearsay statement appeared in 1998 through Sava DURIC's wife, Milica, who did not personally witness the alleged incident.¹⁵⁰⁷
910. Milica DURIC claimed Milka DURIC told her that while hiding with Sava DURIC in the kitchen, she heard the sound of fire from the floor above. The story had now changed to a Croatian soldier leading Milka DURIC out of the house. As she was led away, Milka DURIC saw another soldier force Sava DURIC into the burning house.¹⁵⁰⁸
911. Milica DURIC claimed that she later returned to the house and found "white ash" but "didn't find a single bone."¹⁵⁰⁹
912. Nowhere in the 1998 statement did Milica DURIC mention that her son, Mile DURIC, was present at any time on 6 August 1995 or that he had any information relating to his father's death.
913. Milica DURIC's hearsay story changed again in 2004. This time, she claimed that Milka DURIC told her that as she was being led away from the house, she turned around and allegedly saw a soldier push Sava DURIC into a burning workshop next to the house.¹⁵¹⁰
914. Milica DURIC also stated in 2004 that when she asked a Croatian soldier outside whether Sava DURIC and Milka DURIC were inside the burning house, he told her that nobody was in the house, and then prevented Milica DURIC from running into the burning structure. In 1998, Milica DURIC made no mention of any of this.¹⁵¹¹

¹⁵⁰⁶

P-239.

¹⁵⁰⁷

D-397(Milica Duric),pg.3; **P-1004**(Milica Duric),para.6; **Milica Duric**,T:10774:22-24.

¹⁵⁰⁸

D-397(Milica Duric),pg.3.

¹⁵⁰⁹

D-397(Milica Duric),pg.4.

¹⁵¹⁰

P-1004(Milica Duric),para.6. This version is the most similar to the version in the Croatia

Helsinki Committee Report. **P-2402**,pgs.45-46.

¹⁵¹¹

Compare **D-397**(Milica Duric) with **P-1004**(Milica Duric).

915. There was no evidence that any of the alleged Croatian soldiers attempted to harm Milica DURIC or neighbors with whom she was allegedly hiding in the cellar.
916. Milica DURIC's implausible 2004 hearsay story is inconsistent with her 1998 story, which is inconsistent with the 1995 story. The 2004 story makes no mention of a Croatian soldier entering the house and, for the first time, it is the workshop not the house into which Sava DURIC is allegedly pushed. Additionally, introduced is a third-level hearsay conversation between two alleged Croatian soldiers and Sava DURIC allegedly heard by an elderly woman over the sounds of an allegedly burning house.
917. The evidence surrounding this unlikely scenario continued when conveniently for the first time in 2004, following the death of Milka DURIC, her grandson Mile DURIC claimed to be an eyewitness after having kept his silence for nine years.¹⁵¹² Despite having lived with his mother, Milica DURIC, that entire period, Mile DURIC never discussed his observation with his mother.¹⁵¹³
918. Prior to Operation Storm, the ARSK mobilized all military aged men, which would have included the then-29 year old Mile DURIC.¹⁵¹⁴ However, Mile DURIC claims he never served in the ARSK because of *poor eyesight*.¹⁵¹⁵
919. Mile DURIC testified that, on 4 August 1995, he was in the hills in Durica Previđa, several kilometers from his family house in Durici.¹⁵¹⁶ During the ongoing military operation on 5 August, Mile DURIC claimed that Milica DURIC visited him. Mile DURIC also claimed that, on 6 August 1995, when Milica DURIC was supposedly hiding in the family's basement with eight (8) neighbors, he came down to supper with them.¹⁵¹⁷
920. However, in 1998 Milica DURIC stated that on 5 August 1995 she was too afraid to leave her home and made no reference to visiting her son.¹⁵¹⁸

¹⁵¹² Mile Duric, T:4867:3-17.

¹⁵¹³ D-397(Milica Duric), pg.3; Mile Duric, T:4863:7-15; 4867:3-17.

¹⁵¹⁴ P-2619.

¹⁵¹⁵ Mile Duric, T:4860:9-21; 4853:20-23.

¹⁵¹⁶ Mile Duric, T:4853:24-4854:8; P-437(Mile Duric), para.3; D-396.

¹⁵¹⁷ P-436(Mile Duric), para.5.

¹⁵¹⁸ D-397(Milica Duric), pgs.2-3.

Similarly, in 2004 Milica DURIC again made no mention of visiting Mile DURIC on 5 August or him being present on 6 August.¹⁵¹⁹

921. Amazingly, while eight people allegedly were crowded into the family's basement shelter, the non-soldier Mile DURIC decided to go for a 1 km stroll into town to buy cigarettes.¹⁵²⁰ In addition to the timeline questions raised by someone allegedly walking 3.5 km to Durici, and then a further 1 km from Durici to the store to buy cigarettes, the walkabout allegedly occurred during a period of shelling.¹⁵²¹
922. Mile DURIC's story is that after obtaining cigarettes, he walked 1 km back toward Sava DURIC'S house, ultimately allegedly hiding in a neighbor's yard behind a wall. As he was walking back he saw that the house was burning, and when he reached the house, "the roof tiles had already started falling down and *the workshop had been burned down.*"¹⁵²²
923. Given that Mile DURIC testified that when he arrived at the neighbor's yard the workshop had already burned down, his remaining testimony claiming to witness two Croatian soldiers throwing Sava DURIC into a burning workshop is not credible. Moreover, Mile DURIC's physical location while hiding in the neighbor's yard reveals that his view of the alleged incident would have been obstructed by a brick wall, a gate and a large tree.¹⁵²³ Mile DURIC, who could not serve in the ARSK because of poor eyesight, would not have been able to see much even with perfect vision.¹⁵²⁴
924. Further calling into question the testimony of Mile DURIC is the testimony of Milica DURIC who made no mention of Mile DURIC being a witness to the incident. After watching the tape of her son's testimony before the Chamber, Milica DURIC stated: "I don't know where exactly he was. I can't really tell

¹⁵¹⁹

P-1004(Milica Duric).

¹⁵²⁰

P-436(Mile Duric),para.5; **P-437**(Mile Duric),para.5.

¹⁵²¹

D-396.

¹⁵²²

Mile Duric,T:4843:6-9(Emphasis added).

¹⁵²³

P-440,pg.3.

¹⁵²⁴

Additionally, Mile DURIC's recitation of third person hearsay statements allegedly made by Croatian soldiers to his grandmother and father require the Chamber to believe that the soldiers were speaking so loudly as to be heard over an alleged inferno that had brought down the family house and workshop.

you whether he saw this or not, but my mother-in-law told him just as she told me.”¹⁵²⁵

925. Given this admission by Milica DURIC relating to Mile DURIC, it would not be a reasonable interpretation of the evidence for the Chamber to find that Mile DURIC was in fact an eyewitness. In addition, it is extremely unlikely that, had he actually witnessed these events, he would not have told his mother for nine years.¹⁵²⁶ The Defence submits that Mile DURIC’s testimony is a recent fabrication.
926. Further questions include that the alleged unexamined remains of Sava DURIC could only be identified as human. Given that the alleged remains were exhumed from a cemetery, these remains could belong to anyone.
927. Finally, there is no evidence identifying a particular unit of the HV as being involved with this incident.
928. The poor quality of evidence of the alleged killing in SK2 is not sufficient to support a finding of murder.¹⁵²⁷

3. SK 3

929. [REDACTED]
930. SK3 alleges five deaths in Zagrovc, Knin Municipality from 5-12 August, including an “unidentified” victim. There is neither physical nor eyewitness evidence substantiating the existence of this alleged unidentified decedent,

¹⁵²⁵ **Milica Duric**,T:10775:23-10776:2;10776:18-25.

¹⁵²⁶ **D-397**(Milica Duric),pg.3; **Mile Duric**,T:4863:7-15;4867:3-17.

¹⁵²⁷ In *Halilovic*, the Trial Chamber held that the alleged murder of Mara Grubesa, an elderly woman, was not proven beyond a reasonable doubt because the only evidence was that her barn caught fire, witnesses saw ABiH soldiers in the vicinity of the barn, and her husband later claimed to have found her remains inside. *Halilovic*,TJ,para.603. Also the *Halilovic* Trial Chamber found that while there was much hearsay evidence that an entire family was killed (someone said they had seen bodies in the house, another said they were all killed in a meadow nearby, an official military record notes they were killed), the bodies were never found, and the hearsay evidence was insufficient to prove murder. An autopsy confirmed a leg found belonged to one of the family members, but the cause of death could not be determined. *Halilovic*,TJ,paras.445-452. Similarly, in *Milutinovic*, the Chamber held that murder was not established for one victim for whom no forensic evidence was found.

Milutinovic,TJ,Vol.II.,para.233.

¹⁵²⁸ [REDACTED]

much less the circumstances of his/her death. The only evidence for the remaining 4 decedents comes from PW-P69,¹⁵²⁹ an elderly individual who suffered a stroke affecting his memory, and limited physical evidence from three bodies.¹⁵³⁰

931. The limited physical evidence establishes that Milka PETKO died from gunshot wounds to the chest at some point prior to 14 August.¹⁵³¹ For Ilija PETKO and DMITAR RASUO, the physical evidence establishes only that they died prior to 9 September from gunshot wounds to the chest.¹⁵³² There is no physical evidence relating to Duro RASUO.

932. PW-P69 did not see any of the alleged murders. Further, the circumstantial evidence provided by PW-P69 is not credible because he gave prior inconsistent versions of the events.

933. The first version of PW-P69's story is found in an UNCIVPOL report¹⁵³³ wherein PW-P69 claimed to have personally found 6 bodies sometime prior to 24 August 1995.¹⁵³⁴

934. [REDACTED]

¹⁵²⁹ Although PW-P69 was able to point out errors in his witness statement [REDACTED] to the Prosecution, he was unable to adequately make a *92 ter* attestation. PW-P69,T:2700:12-24.
¹⁵³⁰ P-1302; P-1303; P-1304; P-1520; P-1521; P-1522; P-659.

¹⁵³¹ P-1302; P-1520.

¹⁵³² P-1303; P-1304; P-1521; P-1522.

¹⁵³³ P-235. Note that the information was relayed to UNCIVPOL ROMASSEV, but the report was prepared by another UNCIVPOL member in his absence. See P-2513(Romashev),pg.4. Further, this report is the source for the relevant information in D-174 and P-177 so those exhibits do not add further evidence.

¹⁵³⁴ P-235.
¹⁵³⁵ [REDACTED]
¹⁵³⁶ [REDACTED]

935. On 13 May 2008, when testifying under oath, PW-P69's story changed dramatically, and now testified that he had only seen one body, Ilija PETKO.¹⁵³⁷ He had only heard about the other bodies¹⁵³⁸ from an unnamed "not quite sane" woman. He had either adopted her alleged observations as his own, or had them attributed to him by Prosecution investigators.¹⁵³⁹
936. Beyond that dramatic "correction," PW-P69 was unable to verify the remaining allegations in his prior statements because of a stroke.¹⁵⁴⁰
937. The Prosecution did not ask a single question on direct examination regarding Dmtar RASUO's death described in the unverified 1997 statement drafted by the Prosecution.¹⁵⁴¹ [REDACTED]
938. On cross examination, PW-P69 admitted not knowing if the Croatian soldier took RASUO around the house to show him directions.¹⁵⁴⁴ Further, he was unable to approximate how many rounds he heard in what he described as a "burst of fire" in his statement.¹⁵⁴⁵ Significantly, PW-P69 could not tell if the gunfire was connected to the death of Dmtar RASUO or the ongoing armed conflict in the vicinity.¹⁵⁴⁶
939. Casting further doubt, Dmtar RASUO's autopsy report does not corroborate a "burst of gunfire" because there was only one confirmed gunshot wound.¹⁵⁴⁷
940. At the time and location of this incident, there was ARSK movement¹⁵⁴⁸ and active combat in which the HV suffered casualties.¹⁵⁴⁹ Given this and the fact

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PW-P69,T:2721:6-20; [REDACTED]

1538

Given this "correction," there is no evidence substantiating the death of Djuro Rasuo.

1539

PW-P69,T:2699:15-25.

1540

PW-P69,T:2700:17-24.

1541

PW-P69,T:2695:15-2726:2.

1542

1543

1544

PW-P69,T:2747:9-16.

1545

PW-P69,T:2747:17-2748:2.

1546

PW-P69,T:2748:5-2749:18.

1547

P-1522.

1548

PW-P69,T:2730:20-22; [REDACTED]

that there are no eyewitnesses to relate the circumstances of these deaths, it cannot be excluded that they were killed by either of the warring factions during combat or at some time later by non-military returnees. Thus, under a full review of the facts presented, a finding of murder is not permissible.

4. SK 4

941. Unlike the overwhelming majority of alleged killing incidents, the Prosecution presented a large amount of evidence including witnesses and documents dedicated to SK4, commonly referred to as the “Grubori Incident.”
942. Although the evidence is in some respects in dispute, it is undisputed that SK4 was not committed by perpetrators under the command of GOTOVINA and he had no knowledge of this incident. As a result, a finding of murder against GOTOVINA relating to SK4 is not permissible.

5. SK 5

943. There is no autopsy and no eyewitness testimony relating to the death of Tode MARIC.¹⁵⁵⁰ Instead, the Prosecution presented only the Rule 92 *quater* statement of an alleged ear-witness to the incident, Petar COLOVIC, preventing the defence from questioning the witness;¹⁵⁵¹ hearsay statements from international witnesses;¹⁵⁵² hearsay reports from internationals;¹⁵⁵³ and a statement from Draginja URUKALO, who neither witnessed anything relating to the incident nor saw the body of MARIC.¹⁵⁵⁴
944. MARIC was allegedly killed on 13 August 1995 by two policemen dressed in grey uniform and another man in camouflage yet no body has been discovered.¹⁵⁵⁵

¹⁵⁴⁹ ████████ D-177; D-178.

¹⁵⁵⁰ Lest there be any confusion, a decedent of a similar name, Todor MARIC, is FC198, and there is evidence that he was an ARSK soldier buried in the Knin cemetery. P-1428.

¹⁵⁵¹ P-2680(Colovic).

¹⁵⁵² P-2513(Romashev),p.10; P-216,(Elleby); P-598,(Rehn); P-677,(Roberts).

¹⁵⁵³ P-243; D-179; P-2402,pg.49.

¹⁵⁵⁴ P-964(Urukalo),para.8.

¹⁵⁵⁵ P-243; D-179. In addition to these reports, COLOVIC allegedly witnessed a small yellow car in the area following the incident which contained what appeared to be two soldiers with guns pointing up between their legs. P-2680(Colovic),pg.13,para.6; pg.16,para.7. This is inconsistent with UNCIVPOL reports and the statement of ROMASSEV who himself contradicted UNCIVPOL reports

945. Under any reading of the facts, no evidence was presented to substantiate that the perpetrators were subordinates of GOTOVINA and as a result, there can be no finding of murder.

6. SK 6

946. The Prosecution alleges that SK6 involved the murder of six unidentified males and Milos BORJAN.¹⁵⁵⁶

947. The Prosecution offered no witnesses to this incident, never identified alleged perpetrators by name or even by unit, and never offered any evidence that GOTOVINA received notice of this alleged incident.

948. There is no physical evidence substantiating the existence or death of the six alleged unidentified victims in SK6.

949. The sole physical evidence was one autopsy report of BORJAN, which establishes only that BORJAN likely suffered gunshot wounds to the torso and head.¹⁵⁵⁷ As admitted by Prosecution expert DR. CLARK, an autopsy report tells nothing about the circumstances of how the individual perished.¹⁵⁵⁸ Since BORJAN was a 26 year old male wearing military boots at the time of the incident, the autopsy cannot exclude that the injuries were combat-related.

950. The Prosecution offered no direct evidence regarding the circumstances of BORJAN's death. Rather, all that is in the record is the hearsay evidence from witness PW-P136 and a hearsay HRAT report, both claiming to relate the evidence of three eyewitnesses to the incident.¹⁵⁵⁹ Even then, the incident involved armed and uniformed ARSK soldiers.¹⁵⁶⁰

stating that unidentified local residents told him that "two Croatian policemen, one in grey uniform and the other in camouflage uniform" shot MARIC. **P-2513**(Romassev),pg.10. It is not known if COLOVIC was ROMASSEV's source, and therefore may have provided conflicting stories. Because the defense was unable to inquire about the information within either COLOVIC's or ROMASSEV's statements, it would be unreasonable for the Trial Chamber to conclude that the incident involved Croatian soldiers for whom GOTOVINA is personally responsible.

¹⁵⁵⁶ **PTB**,pg.124 and Annex D; **P-2017**; **P-1309**.

¹⁵⁵⁷ **P-1527**.

¹⁵⁵⁸ **Clark**,T:14199:23-14200:1.

¹⁵⁵⁹ [REDACTED] **PW-P136**,T:712:24-714:9; **P-40**,p.3. Note that this hearsay evidence claims that there were 6 alleged victims including Milos BORJAN, not the seven claimed by the **J1**.

¹⁵⁶⁰ **PW-P136**,T:713:10-21; [REDACTED] **P-40**,p.3.

951. Further, the hearsay evidence indicates that following the alleged incident, three survivors were escorted by the HV toward Sector South Headquarters in Knin.¹⁵⁶¹ Permitting three witnesses to immediately go to Sector South Headquarters is more consistent with behaviour following an exchange of fire resulting in BORJAN's death than a murder of ARSK soldiers *hors de combat*.

952. The Prosecution presented insufficient evidence to determine the actual circumstances of this incident, the actual number of victims and the identity of the perpetrators. As a result, as to GOTOVINA there can be no finding of murder.

7. SK 7

953. The evidence establishes that seven elderly civilians were killed on 6 August while walking to Knin along the Knin-Drnis road.¹⁵⁶² The group was stopped near Udzolje by three armed men in a white civilian vehicle.¹⁵⁶³ [REDACTED]

[REDACTED]

954. [REDACTED]

955. [REDACTED]

1561 [REDACTED]
1562 P-1528-P-1534; P-1736-P-1759; P-2000; P-2018-P-2024; [REDACTED]
1563 [REDACTED] P-2685(Dragutin),pg.11.
1564 [REDACTED]
1565 [REDACTED] F [REDACTED]
1566 [REDACTED]
1567 [REDACTED]
1568 [REDACTED]

[Redacted]

956. [Redacted]

957. [Redacted]

958. If true, the soldier should have reported the incident, but there is no record that this was done. Further, the accuracy of this statement is highly questionable.
[Redacted]

959. Second, these allegations were not reported to the UN until 31 October 1995.¹⁵⁷⁵ [Redacted]

960. [Redacted]

1569 [Redacted]
1570 [Redacted]
1571 [Redacted]
1572 [Redacted]
1573 [Redacted]
1574 [Redacted]
1575 P-1108; P-68,pg.63; P-172(Anttila),pg.3.
1576 P-1292,pg.8.
1577 [Redacted] P-1108; P-68,pg.63; P-172(Anttila),pg.3.

961. The UN investigation into this incident indicated that these victims were killed with a carbine hunting rifle, not an HV weapon.¹⁵⁷⁸ This fact, along with the fact that the rogue individuals hid the victims from the passing HV vehicles, casts serious doubt on the Prosecution's assertion that the perpetrators were GOTOVINA subordinates. To further call the identity of the perpetrators into question, it has been established that by 6 August, civilians were already coming to Knin.¹⁵⁷⁹
962. As for the action of Croatian law enforcement, on 9 August the civilian police informed a "civilian protection team and Dr. Tomo SUGNETIC" about the bodies.¹⁵⁸⁰ The following day, the MUP recovered the bodies.¹⁵⁸¹ [REDACTED]
963. The failure, if any, to properly investigate this incident rests solely with the MUP in Kotar Knin, who received notice of this event. GOTOVINA, who had no responsibility for criminal proceedings and no knowledge of the event, cannot be found responsible if the MUP failed to perform its duties of investigation properly.¹⁵⁸³

8. SK 8

964. SK8 involves the killings of Uros SARIC and Uros OGNJENOVIC in Kakanj on 18 August.¹⁵⁸⁴
965. The perpetrators were two unidentified males – one in civilian clothes and one in military uniform, with no unit identified by any witness.¹⁵⁸⁵
966. As previously outlined, a person in camouflage is insufficient evidence that the person was an actual HV member. In fact, throughout the period

¹⁵⁷⁸ Antilla, T:2634:1-18; P-172(Anttila),pg.3.

¹⁵⁷⁹ P-352,pg.6.

¹⁵⁸⁰ D-57,pg.4.

¹⁵⁸¹ P-1310 through P-1316.

¹⁵⁸² [REDACTED]

¹⁵⁸³ Popovic, T.J, para.1046; Boskoski, T.J, para.536; Boskoski, A.J, paras.231,234,268,269,270;

Hadzihasanovic, T.J, para.175; Strugar, T.J, para.376; Krnojelac, T.J, para.127; Krstic, A.J, para.143, fn.250.

¹⁵⁸⁴ On 23 March 2009, following the argument of GOTOVINA at 98bis, the Prosecution withdrew SK 8.1—Danica Saric.

¹⁵⁸⁵ P-2511(Ognjenovic),para.15.

following Operation Storm civilians from Split, Zadar, Sibenik or Rijeka would often come to Kakanj.¹⁵⁸⁶

967. Croatian civilian authorities investigated this incident and identified a suspect.¹⁵⁸⁷ However, witnesses did not identify the suspect from a photograph line-up.¹⁵⁸⁸
968. There is insufficient evidence that the alleged perpetrators were subordinates of GOTOVINA. A finding of murder is therefore not permissible.

9. SK 9

969. SK9 relates to the alleged killing of Marta VUJNOVIC in the village of Oton on 18 August.¹⁵⁸⁹
970. The Prosecution offered no eyewitnesses to this incident, never identified alleged perpetrators by name or even by unit, and never offered any evidence of GOTOVINA's notice of this alleged incident. Again, the incident occurred during a period where civilians were freely moving throughout the area.¹⁵⁹⁰
971. The Prosecution's only live witness, the decedent's son Jovan VUJNOVIC, testified that he had cordial relations with HV and civilian police, who visited regularly.¹⁵⁹¹ He testified that he did not believe that his mother's death was caused by Croatian soldiers, but rather that others may have killed her, even positing that "the Chetniks [had] killed some of their family members so it was really hard to tell."¹⁵⁹² As VUJNOVIC stated, "[n]obody knew who killed her or why she was killed."¹⁵⁹³
972. Petar KNEZEVIC's Rule 92 *quater* statement indicates that 3-4 members of the HV came to KNEZEVIC's house after Operation Storm asking questions

¹⁵⁸⁶ P-2511(Ognjenovic),para.12.
¹⁵⁸⁷ D-874; Ognjenovic,T:10741:20-10742:4; P-991 through P-1003; P-1070; D874; D-877.
¹⁵⁸⁸ D-874,pg.2. This is an example of the difficulty in proving murder. Bajic,T:20767:14-20768:7.
¹⁵⁸⁹ PTB,para.124.
¹⁵⁹⁰ D-499.
¹⁵⁹¹ Vujnovic,T:4568:19-4569:7; P-414,(Vujnovic),para.5.
¹⁵⁹² Vujnovic,T:4577:25-4578:4;4555:16-4556:5.
¹⁵⁹³ Vujnovic,T:4578:3-4.

about weapons and soldiers in the area. Allegedly during this conversation, these HV members knew Marta VUJINOVIC had been killed.¹⁵⁹⁴

973. Naturally, knowledge of a murder alone does not imply commission of a murder. From this evidence, the Prosecution cannot exclude that these HV members learned of the murder from VUJINOVIC, who testified he had discussed the incident with both members of the HV and the civilian police.¹⁵⁹⁵
974. In any event, the Prosecution has presented insufficient evidence to determine the actual circumstances of this incident, or the actual perpetrator(s). As a result, as to GOTOVINA there can be no finding of murder.

10. SK 10

975. SK10 involves the alleged killing of four individuals in Oraovac, Donji Lapac Municipality on 7 August. This location is within the area of responsibility of the Gospic Military District, not the Split MD.¹⁵⁹⁶
976. As a result, GOTOVINA had no authority in the area, his subordinates could not have been involved in the incident, and a finding of murder against GOTOVINA is not permissible.

vii. Analysis of alleged murders in Further Clarification Schedule

1. No record evidence presented

977. There are 20 FC entries where the Prosecution failed to present any record evidence: 21, 23, 24, 29, 31, 32, 33, 80, 85, 131, 132, 135, 140, 141, 259, 274, 283, 285, 312 and 317.
978. This failure precludes any finding against GOTOVINA relating to these incidents.

¹⁵⁹⁴ P-634,(Knezevic),para.6.
¹⁵⁹⁵ Vujinovic,T:4577:20-21;4578:8-20.
¹⁵⁹⁶ D-726.

2. Natural causes

979. There are 9 FC entries where there is evidence that the individuals likely died of natural causes.¹⁵⁹⁷ This group includes 7 individuals who apparently died at the Knin hospital.
980. As there is no evidence that the deaths of these individuals were the result of an act or omission of GOTOVINA, or of a person for whom GOTOVINA is criminally responsible, there can be no finding of murder against GOTOVINA relating to these incidents.

3. Potential suicides

981. In FC13 and FC18 the evidence submitted raises the reasonable possibility that the individuals committed suicide.
982. With respect to FC13, Dr. CLARK reviewed the autopsy report and other physical evidence and concluded that suicide could not be discounted as a possible cause of death.¹⁵⁹⁸
983. Similarly, the evidence relating to FC18 once again cannot exclude the possibility that this individual committed suicide by jumping into a well.¹⁵⁹⁹ As Dr. CLARK noted in his autopsy report, there were no signs of violence to the body, and the possibility existed that she could have died of natural causes.¹⁶⁰⁰
984. Given that suicide cannot be excluded as a cause of death, there can be no finding of murder against GOTOVINA relating to these incidents.

¹⁵⁹⁷ Appendix E.

¹⁵⁹⁸ Clark, T:14223:22-14230:9.

¹⁵⁹⁹ Another example of this method of suicide are the circumstances of the death of Danica Saric, SK 8.1, who the Prosecution dropped following the 98bis hearing in recognition that the evidence did not support an allegation of murder, but rather she committed suicide by jumping into a well.

¹⁶⁰⁰ P-1543.

4. Unascertained causes of death

985. In 27 FC entries, the Prosecution's autopsy evidence could not ascertain a cause of death and there is no additional credible record evidence of the potential causes of death.¹⁶⁰¹
986. In 52 FC entries, the Prosecution offered no autopsy or any other evidence substantiating an unlawful cause of death.¹⁶⁰²
987. Thus, for these 79 cases, the Prosecution can only prove that a person died, but cannot exclude for the reasonable possibility that the death may have resulted from natural causes or accidents. Further, in all of these cases there is no evidence of the circumstances in which these individuals died or, to the extent that some could have died as a result of an unlawful act, who the perpetrator may have been.
988. The Prosecution's expert witness, Dr. BACCARD, testified that when the cause of death is unascertained it is possible that the victim died of natural causes.¹⁶⁰³ Where the cause of death cannot be determined, it has been held that murder was not established.¹⁶⁰⁴
989. There is insufficient evidence for the Trial Chamber to conclude that these incidents were deaths resulting from an act or omission of GOTOVINA, or of a person for whom GOTOVINA is criminally responsible.

5. Deaths potentially related to combat

990. MRKSIC reported to the VJ Main Staff that the ARSK suffered 170 killed and 457 wounded during Operation Storm. Among those killed were 65 members of the Lika Corps, 53 members of the 7th Knin Corps and 40 members of the

¹⁶⁰¹ Appendix F; P-1251,pg.5.

¹⁶⁰² Appendix G.

¹⁶⁰³ **Baccard,T**:16010:2-11;16011:1-6;16013:5-8;16016:11-14.

¹⁶⁰⁴ In *Milutinovic*, murder was not established for one victim for whom no forensic evidence was found. *Milutinovic*,TJ,para.233. In another instance, murder was not established in a case where a witness saw the victim's house being burnt down, heard gun shots, and saw his bullet-ridden body 19 days later(he claims it was preserved by smoke), because the evidence about the state of the body was unconvincing and cause of death and by whom could not be established. *Milutinovic*,TJ,para.324.

75th MTBR, totaling 158 ARSK combat deaths in the areas where GOTOVINA's and MARKAC's forces operated.¹⁶⁰⁵

991. The Prosecution included 20 FC instances of alleged murder where, based on the timing, location and attire of the decedents, the evidence suggests that the deaths were of ARSK members lawfully killed in combat.¹⁶⁰⁶
992. Because the RSK's population was generally armed with many conscripted into the ARSK, resulting in an average soldiers' age of 47, the lack of evidence of circumstances for many FC incidents occurring during active combat¹⁶⁰⁷ makes it impossible to exclude that those deaths could have been legitimate combat casualties, either active combatants or unintentionally killed non-combatants in proximity to combat, or people killed by ARSK or other Serbs before the evacuation.¹⁶⁰⁸
993. The Prosecution also included 42 FC instances which may have occurred in close proximity to active combat and the causes of death are consistent with combat activity.¹⁶⁰⁹
994. For some of these instances, there is evidence as to the cause of death, but no record evidence relating to the circumstances of the deaths which could support a determination of the *mens rea* of an alleged perpetrator. Moreover, in the event that any individuals were killed unlawfully, there is no evidence to determine the alleged perpetrators.
995. In these cases there is no eyewitness testimony, no evidence of distance of fire, no evidence conclusively establishing the weapons involved nor any other evidence of pertinent details to permit the Trial Chamber to exclude for the possibility that the individuals were taking active part in the hostilities, were killed by "friendly fire" from the ARSK, or were killed by HV fire lawfully directed at combatants.

¹⁶⁰⁵ **D-923**,pg.23.

¹⁶⁰⁶ Appendix D; Appendix H.

¹⁶⁰⁷ In many cases, the only evidence of a date of death is the date the body was discovered proving only that the person died prior to that date but not conclusively establishing a date of death.

¹⁶⁰⁸ **D-101**; **D-1513**,para.5; **Mrksic**,T:18851:7-16;18934:20-21;18949:14-15;19005:20-19006:1; **D-1736**,para.13; **Lazarevic**,T:17943:2-11; **D-1461**(Lazarevic),pg.26.

¹⁶⁰⁹ Appendix D; Appendix I.

996. These alternate inferences are supported by several alleged murder incidents in which the evidence suggests that the individuals may have died as a result of “friendly fire” or killed prior to the HV arrival.
997. A prominent example discussed by numerous witnesses was an incident outside the Sector South Headquarters on 5 August, in which six individuals were found dead by UN personnel (FC185-190), including one man who had been killed by a gunshot wound, after a caravan they were traveling in was hit with a mortar.¹⁶¹⁰ As BERIKOFF testified, given the time of the incident and the fact both sides used similar weaponry, and the lack of a crater analysis, the mortar may have been fired by the ARSK.¹⁶¹¹ This is particularly true given that on 4 August there had been previous incidents of the ARSK firing mortars into and around Sector South Headquarters.¹⁶¹²
998. In addition to potential “friendly fire” incidents, the record reveals incidents of violent acts committed by ARSK members against the civilian population as they retreated, including shootings and ARSK tanks running over civilians.¹⁶¹³
999. In one instance, Croatian authorities indicted an ARSK member for his alleged criminal act of killing two elderly persons (FC334 and FC335) in Benkovac before the HV entered the town.¹⁶¹⁴
1000. Another circumstance that cannot be excluded by the Trial Chamber would be accidental deaths caused by explosive devices and booby traps left in the area following the military operation.
1001. One example is FC73, in which the decedent is unnamed, with no record evidence submitted as to the circumstances of the death. The physical evidence presented, including an autopsy report and Croatian Protocol, indicates that the individual died from probable blast injuries before 27 September.¹⁶¹⁵ Given the prevalence of explosive devices throughout the

¹⁶¹⁰ D-3; D-179,pg.11; [REDACTED] P-700,pgs.1,3,4; P-747; P-980(Dawes),pg.7; P-1621; P-1904; P-1905; P-1906; P-2006; P-2095.

¹⁶¹¹ Berikoff,T:7710:4-10.

¹⁶¹² Hill,T:3817:19-3818:10.

¹⁶¹³ D-1461(Lazarevic),pg.30; D-1308; Puhovski,T:15975:4-15976:6.

¹⁶¹⁴ D-2023.

¹⁶¹⁵ P-1569; P-1367.

area,¹⁶¹⁶ it cannot be discounted that this unnamed individual was accidentally killed by an explosive after the operation concluded. While Dr. BACCARD noted that he believed the wounds were more reflective of gunshot injuries, the disagreement among trained pathologists only heightens the uncertainty as to the circumstances of this incident.¹⁶¹⁷

1002. A similar example is FC70, in which a decedent was found on 22 September who may have died from explosive injuries.¹⁶¹⁸
1003. Another example is FC67, in which an elderly woman died of head trauma at some point prior to 8 September.¹⁶¹⁹
1004. Given the lack of evidence as to the perpetrators and circumstances of many of the alleged incidents, the evidence relating to these incidents is wholly inadequate to prove a murder by a subordinate of GOTOVINA to the exclusion of other plausible inferences.

6. No evidence of perpetrators

1005. To prove culpability for an alleged murder the Prosecution must prove that GOTOVINA had a superior-subordinate relationship with an alleged perpetrator over whom he had effective control.¹⁶²⁰
1006. Although the Defence disputes the quality of evidence in many cases, a weighing of the evidence is not required for 60 FC incidents in which there is no record evidence relating to a perpetrator.¹⁶²¹
1007. Absent any record evidence as to the alleged perpetrators, there can be no finding that GOTOVINA is responsible relating to any of these alleged incidents.

¹⁶¹⁶ D-57,pgs.3,10,18,25,28,37,54; Kardum,T:9497:23-9498:6.

¹⁶¹⁷ P-2314,pg.112. Further, even if the person died from a gunshot wound, there is no evidence of a perpetrator.

¹⁶¹⁸ P-2314,pg.120; P-1364.

¹⁶¹⁹ P-1361; P-1563; P-2005; P-2044.

¹⁶²⁰ Halilovic,TJ,paras.442-444,457; Delic,TJ,paras.219-224,287-290.

¹⁶²¹ Appendix J.

7. No subordinate relationship

1008. The Trial Chamber also cannot exclude the reasonable possibility that in many of the FC incidents, to the extent there is sufficient evidence of a criminal act, the criminal acts were not committed by subordinates of GOTOVINA over whom he had effective control.¹⁶²²
1009. In some instances, hearsay evidence was presented as to both the circumstances of a killing and the alleged perpetrators involved. The perpetrators could be civilians, civilian police, MP, as well as demobilized soldiers.
1010. In FC86, the evidence reveals that the possible perpetrator may have been a civilian.
1011. FC86 involved a decedent allegedly shot in the kitchen of her home.¹⁶²³ The only evidence as to a potential perpetrator is within the CHC Report, wherein it notes that a civilian with a rifle was seen in the area the day before the decedent was allegedly killed.¹⁶²⁴ There is no need to analyze the appropriate weight to be given to this hearsay evidence because there is no evidence that a subordinate of GOTOVINA was involved.
1012. FC30 involved a man reportedly shot in the stomach on 6 September. Although there is little evidence about the circumstances of this killing, the CHC reported that the decedent was seen in the Gracac civilian police station on the day of his death.¹⁶²⁵ Thus, there is no evidence suggesting that the perpetrator was a subordinate of GOTOVINA.
1013. FC150-154 are examples where the alleged perpetrators may have been MP. This particular incident involved the shooting of five men, allegedly in Ocestovo. As supporting evidence of the circumstances of this crime as well as the alleged perpetrators, the Prosecution submitted the Rule 92 *bis*

¹⁶²² See Section VII.D.

¹⁶²³ **P-254**(Further, this UNCIVPOL report dated 10 September 2010 indicates that the police in Zadar were investigating the crime, which is additional evidence that a functioning criminal justice system existed in the liberated territories).

¹⁶²⁴ **P-2402**,pg.47.

¹⁶²⁵ **D-1315**.

statement of Zdravko BUNCIC, the Rule 92 *ter* statements of Marija VECERINA, as well as her *viva voce* testimony.¹⁶²⁶ Additionally, the Prosecution submitted physical evidence with autopsy reports and death reports for these five individuals.¹⁶²⁷

1014. VECERINA testified that these five camouflaged individuals, including her son, Stevo VECERINA, were among a large group of people who were stopped by members of the HV outside of Ocestovo, then sent to the basement of a home near the main road.¹⁶²⁸ While in the basement they were guarded by the HV who advised that the ARSK soldiers would be taken to a military prison, and any wounded individuals would be taken to the hospital.¹⁶²⁹ Ultimately, two soldiers removed the ARSK soldiers after the MP arrived to take the men into custody.¹⁶³⁰
1015. VECERINA had no information about what transpired after the MP took custody of her son and the other four men.¹⁶³¹ She testified that she heard shots fired while in the basement, which were related to the HV stopping another vehicle on the road outside the basement, and not related to any shooting of her son and the other four men.¹⁶³²
1016. Contradicting VECERINA's testimony, the Prosecution submitted the Rule 92 *bis* statement of BUNCIC. Despite having no opportunity to cross-examine the witness, a review of his statement compared with the testimony of VECERINA and the physical evidence reveals that BUNCIC's statement is unreliable.
1017. BUNCIC's story is that he heard machine gun fire 10 minutes after the five individuals were escorted from the basement, along with an alleged quote that only the worst film villain might utter, "[g]ive them another one and let them

¹⁶²⁶ P-2688(Buncic); P-652(Vecerina); P-653(Vecerina).

¹⁶²⁷ P-657 through P-674.

¹⁶²⁸ P-652(Vecerina), paras.11-13; Vecerina,T:6730:6-25.

¹⁶²⁹ P-652(Vecerina), para.14; P-653(Vecerina), para.9; Vecerina,T:6731:11-15.

¹⁶³⁰ P-652(Vecerina), para.14; Vecerina,T:6731:11-15;6732:4-10; D-694.

¹⁶³¹ Vecerina,T:6737:20-6738:4; P-653(Vecerina), para.9.

¹⁶³² Vecerina,T:6735:19-6736:11; P-652(Vecerina), para.16.

fertilize Croatian soil,” after which he claimed to have heard five single shots.¹⁶³³

1018. Interestingly, even the Prosecution had doubts regarding the veracity of this story. In the next paragraph of BUNCIC’s statement, he is asked to explain why Stevan NIKOLIC did not hear any shots.¹⁶³⁴ The month after BUNCIC’s statement was taken, the Prosecution asked VECERINA whether she knew BUNCIC. VECERINA did not know BUNCIC and did not identify him as being present in the basement.¹⁶³⁵
1019. The physical evidence admitted by the Prosecution reveals that the bodies were recovered in Stara Straza, a full 3.5 kilometers from Ocestovo, contrary to the BUNCIC story.¹⁶³⁶
1020. Based upon the physical evidence presented along with the evidence of Ms. VECERINA, the Trial Chamber must disregard the 92 *bis* statement of Zdravko BUNCIC.
1021. There is no reliable record evidence as to the circumstances surrounding the deaths of these five individuals. Moreover, MPs who were taking over captured ARSK soldiers from the HV were doing so pursuant to LAUSIC’s 3 August Order,¹⁶³⁷ which was implemented on the ground by JURIC,¹⁶³⁸ who was not subordinated to GOTOVINA.¹⁶³⁹ BUDIMIR passed on the order to the 72nd MPs, without even copying GOTOVINA.¹⁶⁴⁰ Given the lack of evidence, and the fact that these individuals were placed in the custody of MPs who were not subordinated to GOTOVINA, there is no proof that subordinates of GOTOVINA were involved in this incident.¹⁶⁴¹

¹⁶³³ P-2688(Buncic),para.12.

¹⁶³⁴ P-2688(Buncic),para.13.

¹⁶³⁵ P-652(Vecerina),para.23; Vecerina,T:6738:5-8.

¹⁶³⁶ P-657; P-661; P-667; P-672.

¹⁶³⁷ D-44,pg.3.

¹⁶³⁸ D-268,pg.2.

¹⁶³⁹ Lausic,T:15405:6-9

¹⁶⁴⁰ P-2200,pg.2.

¹⁶⁴¹ Over the course of Storm, the MPs properly arrested and detained numerous members of the ARSK and followed the orders they received from their superiors. D-737.

1022. To the extent there is sufficient evidence proving beyond a reasonable doubt that some killings were unlawful, the Prosecution has failed to prove that the likely perpetrator was a subordinate of GOTOVINA.
1023. As outlined previously, the Croatian authorities responsible for law and order faced a chaotic situation that culminated in a crime wave of looting, burning and murder. PUHOVSKI testified that often murders in the liberated areas were committed by looters who committed murder to eliminate witnesses to their criminal activities.¹⁶⁴² GALOVIC corroborated this testimony.¹⁶⁴³
1024. While unable to prosecute every alleged murder, Croatian civilian authorities did investigate and prosecute numerous cases, including 25 listed on the FC.¹⁶⁴⁴
1025. In some instances, perpetrators may not have had their demobilization papers administratively processed or may have been *de jure* still within GOTOVINA's command. However, there is no evidence of any such perpetrators being within GOTOVINA's effective control.
1026. Given that the Croatian government investigated and prosecuted individuals, there can be no question that an effective system to prosecute crime existed, and that in light of the existing system there were no additional necessary and reasonable measures that GOTOVINA failed to take, particularly with no evidence that GOTOVINA received notice of any alleged murder incidents involving subordinates.
1027. As an example of elements perpetrating the crime wave, PERKOVIC and GALOVIC testified about a group of criminals operating throughout the liberated territory ("Petric Gang") who were investigated for several alleged murders.
1028. PERKOVIC engaged in criminal activities with the Petric Gang, which included Ivica PETRIC, Nikola RASIC, Zvonimir LASAN, Miso

¹⁶⁴² D-1309; Puhovski,T:15978:17-15980:9.

¹⁶⁴³ Galovic,T:19698:20-19699:15.

¹⁶⁴⁴ Appendix K.

JAKOVLJEVIC Zlatko LADOVIC, Milenko HRSTIC and Nedeljko MIJIC.¹⁶⁴⁵

1029. Petric Gang members were charged with the following murders: the Varivode incident (FC95-103), the Gosici incident (FC87-93),¹⁶⁴⁶ the death of Duro CANAK (FC26), the death of Sava SOLAJA (FC155), and the death of Manda TISMA (FC107).¹⁶⁴⁷
1030. GALOVIC prosecuted these individuals in the civilian courts, because the Croatian authorities did not consider these individuals as soldiers, but rather criminals abusing the uniform.¹⁶⁴⁸
1031. The Petric Gang is an example of the amount of damage one small group of criminals can impose on a chaotic area where law and order are being reestablished after many years. The actions of these criminals were neither ordered nor approved by GOTOVINA or any of his subordinate commanders.¹⁶⁴⁹ Likewise, there is no evidence that such actions were approved by the Croatian government and the various prosecutions of these criminals belie any such interpretation of the evidence. As a result, GOTOVINA is not culpable for crimes in which the Croatian government investigated and charged individuals for their actions.

8. Insufficient evidence as to perpetrators

1032. In 19 FC instances, various levels of hearsay evidence were admitted identifying alleged perpetrators of a killing.¹⁶⁵⁰ This evidence was often

¹⁶⁴⁵ **Perkovic,T:19454:17-21;19455:22-19456:3; D-1553(Galovic),pgs.6-8; Galovic,T:19703:4-6;19704:2-11; D-1539(Official Note Perkovic).**

¹⁶⁴⁶ FC94, Gojko LEZAJIC, is referenced in [REDACTED]. The Rule 92 *quater* of Milan LETUNICA (P-635) references a "Gojko" being found in his garden. However, there is no physical evidence confirming this death. Further, although FC87-FC93 were investigated, resulting in a trial, FC94 was not included in this prosecution. Accordingly, the Prosecution has failed to meet its burden of proof that FC94 was a murder.

¹⁶⁴⁷ [REDACTED] **Perkovic,T:19456:22-19457:7;19463:14-19464:3; D-1553(Galovic),pgs.6-10.** To the extent that the Petric Gang or the Prosecution disputes their involvement in these particular crimes, then there are unknown perpetrators responsible with no evidence as to who might have committed the crimes. The same is true for the death of Sava BABIC (FC7) by Mario DUKIC, who was not operating under the command or effective control of GOTOVINA. **D-800; D-9; P-1286; Kardum,T:9469:5-11.**

¹⁶⁴⁸ **Galovic,T:19702:20-19703:10.**

¹⁶⁴⁹ **Perkovic,T:19448:20;19449:10.**

¹⁶⁵⁰ Appendix L.

conflicting and thus insufficient for the Trial Chamber to find that the alleged incidents involved subordinates of GOTOVINA.

1033. One example is FC258, which involved a decedent allegedly shot by two unknown men with long hair and earrings.¹⁶⁵¹ The Prosecution submitted the Rule 92 *quater* statement of Vesela DAMJANIC, the wife of the decedent, who claimed that he was killed by two long haired men who were soldiers.¹⁶⁵² However, DAMJANIC did not identify any specific unit for these alleged perpetrators, stated that these two men were acting on their own, and were not part of a larger unit progressing through the area.¹⁶⁵³
1034. The statement that these two long haired individuals were soldiers is contrasted by the contemporaneous Knin Police Log which notes that DAMJANIC reported that her husband was killed by *unidentified* individuals with long hair and earrings.¹⁶⁵⁴
1035. As outlined previously, given the prevalence of camouflage in the area as well as open access given to civilians, the mere wearing of camouflage is not sufficient proof that an individual was an active duty soldier within the command and control structure of the Split MD.¹⁶⁵⁵ Moreover, in light of the contradictory status of the alleged perpetrators which the Defence was prevented from challenging through cross-examination, the Trial Chamber is not able to conclude that subordinates of GOTOVINA were involved in this incident.
1036. Further examples of the insufficient evidence relating to alleged perpetrators are FC5 and FC6, the deaths of Stana POPOVIC and Mirko POPOVIC. The Prosecution submitted the Rule 92 *bis* statement of Jovan POPOVIC, a relative of the decedents, who claimed that his mother and brother were shot and killed by two unidentified HV soldiers on 7 August. Again, he did not identify any specific unit for these alleged perpetrators.¹⁶⁵⁶ POPOVIC also

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D-57,pg.38.

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P-632(Damjanic).

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P-632(Damjanic).

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D-57,pg.38.

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See Section VII.D.1.

¹⁶⁵⁶

P-2692(Popovic),paras.24-29; P-2402,pgs.43-44.

claimed that his mother was shot through the throat and that his brother was shot twice in the head.¹⁶⁵⁷

1037. The statement is in contrast to additional Prosecution evidence, [REDACTED]
[REDACTED]
[REDACTED] The date of this alleged incident is important when attempting to determine the alleged perpetrators since many HV moved out of the area after the operation or were demobilized, and civilians, civilian police and MP quickly moved in behind the troops.
1038. Additionally, POPOVIC's statement is in direct contrast with the autopsy report for Mirko POPOVIC, which does not indicate that he was shot in the head.¹⁶⁵⁹ Moreover, there is no autopsy report, or any other physical evidence, relating to Stana POPOVIC, rendering it impossible to corroborate Jovan POPOVIC's story.
1039. Given the conflicts between the physical evidence, [REDACTED] and POPOVIC's statement, the Trial Chamber cannot reasonably rely upon POPOVIC's statement.

9. Insufficient evidence as to circumstances of alleged killings

1040. In 7 instances (FC126, FC136, FC137, FC180, FC181, FC184 and FC257), various levels of hearsay evidence were admitted outlining alleged circumstances of killing. These items of evidence were often conflicting, of limited quality, and thus insufficient for the Trial Chamber to find beyond a reasonable doubt that the alleged incidents involved subordinates of GOTOVINA.
1041. Regarding FC126, the death of Jovica PLAVSA, the Prosecution submitted an autopsy report (P-1597), a death report (P-2071), the Croatian Protocol (P-1397), the expert report of Dr. CLARK (P-1251, pg. 7), and the Rule 92 *quater* statement of Nikola PLAVSA (P-2686), the decedent's father. The

¹⁶⁵⁷ P-2692(Popovic), paras.28-29.
¹⁶⁵⁸ [REDACTED]
¹⁶⁵⁹ P-1538.

Defence submitted documents from the Croatian State Attorney's Office and MUP relating to the reimbursement claim of Nikola PLAVSA (D-1455), a portion of the report of Dr. BACCARD analyzing the underlying autopsy report (D-1456), and an aerial map of Golubic showing the hamlets of Bubonje, Dzepine and the house of Nikola PLAVSA (D-1457). These materials, taken together, do not meet the Prosecution's burden of proof.

1042. Nikola PLAVSA is the only individual who provided testimony about the circumstances of this incident. He claimed that on 5 August, his son Jovica PLAVSA, dressed in civilian clothing, was lounging in the front yard of their Golubic home preparing coffee when two HVO soldiers entered the front yard and arrested Jovica PLAVSA.¹⁶⁶⁰ He claimed that these HVO soldiers led his son away, and that after 10 minutes, he heard a single shot coming from the direction of Polijica.¹⁶⁶¹ He claimed that he then found his son's body in a field 100-150 meters from his house.¹⁶⁶²
1043. The credibility of Nikola PLAVSA's testimony could not be tested; however the physical evidence admitted by the Prosecution along with the materials submitted by the Defence reveals the statement is unreliable.
1044. PLAVSA also admits that his son owned a rifle and ARSK uniform, but he claims he was in the family's front yard wearing civilian clothing on 5 August despite ongoing fighting in Golubic.¹⁶⁶³ However, the Croatian protocol, the autopsy report, and Dr. CLARK's report all indicate that Jovica PLAVSA was a soldier and was wearing camouflage.¹⁶⁶⁴
1045. While PLAVSA claims that his son was handcuffed by HVO soldiers, there were no HVO soldiers in Golubic on 5 August. Rather, the 2nd Battalion of the 4GBr was engaged in combat against the ARSK forces in Golubic that

¹⁶⁶⁰ P-2686(Plavsa), paras.4-5; D-1455, pgs.3-7.

¹⁶⁶¹ P-2686(Plavsa), para.6; D-1455, pgs.3-7.

¹⁶⁶² P-2686(Plavsa), para.7; D-1455, pgs.3-7.

¹⁶⁶³ P-2686(Plavsa), para.14; D-178.

¹⁶⁶⁴ Compare P-2686(Plavsa); D-1455; P-1397; P-1597; P-2071; P-1251, pg.7.

day.¹⁶⁶⁵ Further, soldiers are not equipped with handcuffs and do not carry handcuffs with them in combat.

1046. Although PLAVSA claims that the body was located in a field 100-150 meters from his house, the Croatian Protocol states the body was found in the Dzepine hamlet of the village of Golubic, over half a kilometer from PLAVSA's house.¹⁶⁶⁶
1047. While PLAVSA claims that he heard only one shot, the autopsy report confirms multiple gunshot wounds to the head and chest.¹⁶⁶⁷ Moreover, it is highly unlikely that PLAVSA only heard one shot in the morning of 5 August given the firefight between the HV and ARSK in Golubic that day. Eight members of the 4GBr were wounded during the offensive combat activities and three members of the 2nd Infantry Battalion of the 4th GB were killed in close combat in Golubic.¹⁶⁶⁸
1048. The evidence supports plausible alternative conclusions regarding the circumstances of this death. For example, it is possible that the decedent, a uniformed ARSK soldier, was captured during combat and search operations in Golubic on 5 August and handed over to the MPs. In the process of being handcuffed, the decedent may have tried to escape resulting in the MPs firing shots. This plausible alternative explains why there were handcuffs only around one arm, and why there were several gunshot wounds to the head and chest.¹⁶⁶⁹
1049. Moreover, the presence of the handcuffs suggests that the decedent was in the custody of the MPs, who (as explained above) were apprehending ARSK members under LAUSIC's command and not GOTOVINA's. Accordingly, there is no proof that the shots were fired by a subordinate of GOTOVINA.

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D-178.

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P-1397; D-1457.

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P-1597; D-1456.

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D-178.

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P-1597; D-1456.

1050. Regarding FC136 and FC137, the deaths of Ika DONDUR and Vera DONDUR, the Prosecution did not submit any *viva voce* or written testimony regarding the circumstances of these incidents.
1051. Rather, in addition to one autopsy report (P-1602), two Croatian Protocols (P-1402 and P-1403), one death report (P-2076), and two MUP lists of recovered bodies (D-69 and D-358), [REDACTED]
[REDACTED]
[REDACTED] The source of this information is not identified and there is no underlying record evidence supporting this claim.¹⁶⁷⁰ Further, neither the specific HV unit nor the identity of the perpetrator allegedly involved is provided.
1052. Regarding FC180, the death of Jovanka MIZDRAK, the Prosecution submitted a MUP list of recovered bodies (D-352), [REDACTED]
[REDACTED] a 20 August UNCIVPOL report (P-229), and the Rule 92 *quater* statement of Manda RODIC (P-637), a neighbor of the decedent.
1053. RODIC claimed that she, MIZDRAK and another neighbor, Juja MOMIC were standing in her front yard while an HV convoy passed in front of her house. She claimed that two soldiers left the convoy and approached her house. She claimed that one soldier shot MIZDRAK, as she stood outside RODIC's house, because she refused to leave the front yard.¹⁶⁷¹
1054. Despite no opportunity to directly challenge RODIC's testimony, other evidence reveals the statement is unreliable.
1055. Contradicting RODIC's story, the Prosecution also submitted [REDACTED] and P-229, which detail the circumstances of MIZDRAK's death as told to the UN officials. They were informed that MIZDRAK panicked when HV soldiers approached; she turned and ran into the house, and was shot in the doorway.

¹⁶⁷⁰ The underlying UN report [REDACTED] a 21 November HRAT report, is not in evidence.

¹⁶⁷¹ P-637(Rodic), paras.6-9.

1056. [REDACTED]
[REDACTED] Given that her Rule 92 *quater* statement and the story in these UN documents conflict, there are significant doubts about the reliability of her statement.
1057. With this contrasting evidence, there are plausible alternative theories regarding the circumstances of MIZDRAK's death. For example, given the prevalence of weapons in the "Krajina" and the concern over booby traps,¹⁶⁷² it would not be unreasonable for HV soldiers to act in their own defense. If they witnessed a 50 year old person ignoring instructions and racing toward a house possibly with weapons inside, they may have opted to shoot before that person was able to reach those weapons.
1058. Regarding FC181, the death of Stevan MIZDRAK, the Prosecution did not admit any *viva voce* or written testimony regarding the circumstances of this incident.¹⁶⁷³
1059. Rather, in addition to the autopsy report (P-1619), the Croatian Protocol (P-1421), the death report (P-2093), and a MUP list of recovered bodies (D-352), the Prosecution submitted [REDACTED] and a 20 August UNCIVPOL report (P-229).
[REDACTED]
[REDACTED]
[REDACTED]
1060. Moreover, there is no indication in either [REDACTED] or P-229 specific to Stevan MIZDRAK that an alleged perpetrator would have been an HV member, and no indication of the unit to which the alleged perpetrator(s) belonged.
1061. Regarding FC184, the death of Zivko STOJAKOV, the Prosecution did not admit any *viva voce* or written testimony regarding the circumstances of this incident.
1062. The Prosecution tendered the autopsy report (P-1620), the Croatian post-exhumation ID (P-2007), the death report (P-2094), and photographs (P-1902

¹⁶⁷² D-57, pgs.3,10,18,25,28,37,54; Kardum, T:9497:23-9498:6.

¹⁶⁷³ In her Rule 92 *quater* statement, RODIC says she later heard that MIZDRAK was found dead, but she did not see the body and had no information as to how he died. P-637(Rodic), para.16.

and P-1903). Furthermore, the Prosecution relies upon hearsay from an unnamed individual, allegedly STOJAKOV's wife, [REDACTED] within a 25 August Helsinki report to the OSCE (P-988,pgs.5-6).¹⁶⁷⁴

1063. The hearsay story is that STOJAKOV was wearing a Canadian military uniform, not an ARSK uniform, when he was stopped along with others on a tractor near Vrbnik.
1064. There is no underlying record evidence supporting this story. Moreover, the autopsy report and other physical evidence note that STOJAKOV was wearing a military uniform at the time of his death.
1065. Given this contrasting evidence, there are plausible alternative theories regarding the circumstances of STOJAKOV's death. Quite simply, the physical evidence suggests that STOJAKOV was an active member of the ARSK killed in action. This reasonable alternative explanation cannot be discounted based solely on untested hearsay evidence.
1066. As for FC257, the death of Dusan VUKADIN, the Prosecution once again did not admit any *viva voce* or written testimony regarding the circumstances of this incident.
1067. Instead, the Prosecution submitted the autopsy report (P-1665), the Croatian post-exhumation ID (P-2000), the death report (P-2120), the Croatian Protocol (P-1466), photographs (P-1946 and P-1947), and two MUP lists of recovered bodies (D-69 and D-351). [REDACTED]
[REDACTED]
[REDACTED]¹⁶⁷⁵ The source of this information is not identified.

¹⁶⁷⁴ This report allegedly details the results of a "fact-finding" mission in the "Krajina" from 17-19 August. This report was admitted, over objection based upon its unreliability, through William HAYDEN, unquestionably one of the most unreliable witnesses to testify.

¹⁶⁷⁵ The GOTOVINA Defence surmises that despite the different name, this is the same individual identified in FC257 [REDACTED].

1068. There is no underlying record evidence supporting this story. Moreover, the autopsy report and other physical evidence note that VUKADIN was wearing a military uniform at the time of his death. The possibility that VUKADIN was an active ARSK soldier killed in combat cannot be excluded because the only contradictory evidence is hearsay from an unidentified witness. Mere rumour is inadequate to meet the Prosecution's burden of proof.

1069. The insufficient evidence regarding the circumstances of the deaths for FC126, FC136, FC137, FC180, FC181, FC184, FC257 are wholly inadequate to prove a murder by a subordinate of GOTOVINA to the exclusion of other plausible inferences.

F. Counts 8 and 9: Inhumane acts and cruel treatment

i. Law on inhumane acts and cruel treatment

1070. In Counts 8 and 9, the Prosecution alleges that, from the beginning of Operation Storm to 30 September 1995, hundreds of civilians, persons taking no active part in the hostilities, including persons placed *hors de combat*, were subjected to inhumane acts and cruel treatment by GOTOVINA and his subordinates.¹⁶⁷⁶

1071. According to the Prosecution, the inhumane acts and cruel treatment included: (a) seriously injuring civilians during shelling attacks; (b) inhumane conditions of detention and ill treatment in detention; (c) wounding; (d) disappearances; and (e) other serious violations of human dignity.¹⁶⁷⁷

1072. At the outset, the Prosecution must prove that the act or omission is of similar seriousness to the other enumerated crimes under the Article concerned. For inhumane acts, the alleged conduct must be of equal gravity to the crimes enumerated under Article 5(a) to (h),¹⁶⁷⁸ and for cruel treatment to those under Article 3(a) to (e).¹⁶⁷⁹

¹⁶⁷⁶ **JI**,para.34; **PTB**,para.125; **POS**,465:11-25.

¹⁶⁷⁷ **PTB**,para.125.

¹⁶⁷⁸ *Lukic*,TJ,para.960.

¹⁶⁷⁹ *Lukic*,TJ,para.957;*Simic*,TJ,para.74.

1073. For both cruel treatment and inhumane acts, the Prosecution must also prove that the act or omission: (i) caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; (ii) was performed by the accused or a person for whose acts and omissions he bears criminal responsibility¹⁶⁸⁰; and (iii) was committed with the intent to cause serious mental or physical suffering or injury or serious attack on the human dignity, or with the knowledge that this was a probable consequence of the act or omission.¹⁶⁸¹
1074. This assessment is made on a case-by-case basis.¹⁶⁸² The Tribunal has recognized that “great caution” must be exercised before holding that an act, which is not regulated specifically in Article 5, amounts to “other inhumane acts” to ensure that the principle of *nullem crimen sine lege* is not contravened.¹⁶⁸³
1075. Circumstances for the Trial Chamber to consider include, “the nature of the relevant act or omission, the context in which it occurred, its duration and/or repetition, the physical, mental and moral effects on the victim and the personal particulars of the victim, such as age, gender and state of health.”¹⁶⁸⁴ While it is not necessary that the victim suffered long-term effects from the act, the fact that it has long-term effects can be relevant to an assessment of the seriousness of the act.¹⁶⁸⁵
1076. Examples of acts that have been characterized as inhumane or cruel include:
- a. deliberate sniping causing serious injuries and deliberate firing of shells at areas where civilians would be seriously injured,¹⁶⁸⁶

¹⁶⁸⁰ *Lukic*, TJ, paras.957,960;*Stakic*, AJ, para.317;*Delalic*, AJ, para.424.

¹⁶⁸¹ *Popovic*, TJ, para.974;*Mrksic*, TJ, para.516;*Martic*, TJ, paras.80,85;*Simic*, TJ, para.76;
Galic, TJ, para.154; *Krnjelac*, TJ, para.132.

¹⁶⁸² *Lukic*, TJ, para.957;*Krnjelac*, TJ, para.131;*Oric*, TJ, para.352.

¹⁶⁸³ *Lukic*, TJ, para.959;*Martic*, TJ, paras.624-625;*Blagojevic*, TJ, paras.624-625.

¹⁶⁸⁴ *Lukic* TJ, paras.957,961. With respect to cruel treatment, *See also Oric*, TJ, para.352;
Simic, TJ, para.75; *Krnjelac*, TJ, para.131. With respect to inhumane acts, *See also Martić*, TJ, para.84;
Blagojevic, TJ, para.627; *Galic*, TJ, para.153.

¹⁶⁸⁵ *Lukic*, TJ, para.961(re:inhumane acts);*Krnjelac*, TJ, para.144.

¹⁶⁸⁶ *Galic*, AJ, para.158.

- b. forcing people to run down a steep slope while firing at them;¹⁶⁸⁷
- c. ordering prisoners to walk across the confrontation line with wooden rifles;¹⁶⁸⁸
- d. deploying prisoners and detainees as human shields at the confrontation line resulting in several deaths;¹⁶⁸⁹
- e. using detainees in extremely dangerous conditions under constant crossfire for military related tasks including building bunkers, repairing trenches, filling sandbags;¹⁶⁹⁰
- f. forcing a victim to watch the killing of family members and causing him severe burns by burning down his home with him inside;¹⁶⁹¹
- g. locking 50-200 people in a flooded basement with insufficient and even deprivation of food, very limited or no access to toilets, absence of light, and inability to sleep in acceptable conditions;¹⁶⁹²
- h. mutilation and other types of severe bodily harm, beating and other acts of violence;¹⁶⁹³
- i. beating prisoners on a daily basis resulting in death;¹⁶⁹⁴
- j. routine severe beatings resulting in vision impairment;¹⁶⁹⁵
- k. forcibly extracting teeth with rusty pliers; and¹⁶⁹⁶
- l. forcing a prisoner to swallow urine.¹⁶⁹⁷

¹⁶⁸⁷ *Kordic*, AJ, paras. 572-573.

¹⁶⁸⁸ *Naletilic*, TJ, paras. 274-289; *Naletilic*, AJ, paras. 420, 426.

¹⁶⁸⁹ *Naletilic*, TJ, paras. 294-295.

¹⁶⁹⁰ *Naletilic*, TJ, paras. 294-295.

¹⁶⁹¹ *Kupreskic*, AJ, para. 27.

¹⁶⁹² *Hadzihanovic*, TJ, paras. 1592, 1594, 1612.

¹⁶⁹³ *Kvočka*, AJ, para. 435.

¹⁶⁹⁴ *Hadzihanovic*, TJ, paras. 1592, 1594; *Krnojelac*, AJ, para. 163.

¹⁶⁹⁵ *Oric*, TJ, paras. 420-425.

¹⁶⁹⁶ *Oric*, TJ, paras. 412, 419-425.

1077. Cruel treatment was not found in a case of alleged mistreatment of detainees and disappearances at a bank notwithstanding the testimony of several witnesses because the testimony was circumstantial, did not specify the nature of the abuse, perpetrators, or detention conditions.¹⁶⁹⁸

ii. Analysis of evidence of alleged instances of inhumane acts and cruel treatment

1078. The Prosecution's first category of alleged victims of inhumane acts and cruel treatment are those of civilians supposedly seriously injured during shelling attacks.¹⁶⁹⁹ This allegation is premised on the untenable position that civilians were the object of artillery attacks. As set forth above, there is not a single incident to prove that a civilian was seriously injured from an artillery shell purposefully directed at them.¹⁷⁰⁰ Accordingly, this contention has no merit.

1079. As evidence of inhumane acts and cruel treatment, the Prosecution generally referred to individuals who "reported that they had been beaten by Croatian military" after leaving Sector South Headquarters.¹⁷⁰¹ However, the Prosecution offered no evidence relating to these rumored incidents regarding the potential perpetrators, the extent of injuries, or the circumstances surrounding any event.¹⁷⁰²

1080. The Prosecution also alleged "disappearances" constituting inhumane acts and cruel treatment.¹⁷⁰³ However, the Prosecution likewise neither identified nor offered credible evidence of a single such example.¹⁷⁰⁴

1081. The Prosecution did identify and provide evidence on two instances of alleged inhumane acts and cruel treatment in which individuals were wounded that have been previously discussed herein.¹⁷⁰⁵ The two enumerated instances relate to SK1 and SK8.¹⁷⁰⁶ Based on the evidence discussed above, an

¹⁶⁹⁷ *Oric*, T.J., paras. 412, 419-425.

¹⁶⁹⁸ *Hadzihasanovic*, T.J., paras. 1725, 1727, 1781.

¹⁶⁹⁹ *PTB*, para. 125.

¹⁷⁰⁰ See Section V.D.i.

¹⁷⁰¹ *PTB*, para. 125.

¹⁷⁰² The alleged support for this allegation provided in the *PTB* was never admitted into evidence.

¹⁷⁰³ *PTB*, para. 125.

¹⁷⁰⁴ The alleged support for this allegation provided in the *PTB* was never admitted into evidence.

¹⁷⁰⁵ See Section VIII.E.vi.

¹⁷⁰⁶ *PTB*, para. 125.

inference consistent with the innocence of GOTOVINA is also reasonably open on the facts as to Counts 8 and 9.

1082. Another specific incident identified by the Prosecution relates to Bogdan BRKIC.¹⁷⁰⁷ BRKIC's Rule 92 *quater* statement describes his capture by 3 "soldiers" who tied him up and burnt hay and clothes at his feet.¹⁷⁰⁸ Although criminal, the actions, which lasted for a short duration with no physical injury beyond short term discomfort, are not of sufficient gravity to meet the elements of Counts 8 and 9.
1083. Further, the Petric Gang, discussed above, was responsible for this incident.¹⁷⁰⁹ GOTOVINA is not culpable for their criminal activity as they were not in his command or effective control. Additionally, even had they been under his effective control and GOTOVINA knew of the incident, there would have been no requirement for GOTOVINA to become involved in a crime where Croatian civilian authorities appropriately investigated and prosecuted this incident.¹⁷¹⁰
1084. Next, the Prosecution generally alleged that while in detention people were subjected to inhumane conditions and ill treatment. To the contrary, all possible measures were taken by the HV to ensure that the Serb civilian population received adequate shelter, hygiene, safety and nutrition.¹⁷¹¹ The Prosecution's fallacious argument is dealt with above and is without merit with respect to Counts 8 and 9.¹⁷¹²
1085. Likewise without merit is the Prosecution's claim of inhumane acts and cruel treatment based on individuals being stopped, searched and temporarily detained as the HV took control of the area.¹⁷¹³ These actions, justifiable for

¹⁷⁰⁷ PTB, para.125; **98bis**, T:17423:20-22.
¹⁷⁰⁸ **P-2506**(Brkic), pg.4; **Perkovic**, T:19489:19-19492:15.
¹⁷⁰⁹ See Section VIII.E.viii.7.
¹⁷¹⁰ **Perkovic**, T:19492:3-15; **D-1539**.
¹⁷¹¹ Article 17, Additional Protocol II; **Popovic**, TJ, para.901, fn.3094.
¹⁷¹² See Section V.D.iv.7.
¹⁷¹³ PTB, para.125.

imperative military reasons securing safety of civilians, in no way qualify as violations under Counts 8 and 9.¹⁷¹⁴

1086. The Prosecution submitted a Rule 92 *quater* statement of Konstantin DRCA, who was taken into MP custody in August 1995 to face a 1993 terrorism indictment. He allegedly suffered mistreatment while in MP custody and also relayed stories told to him by a third party claiming similar abuse. The uncorroborated statement replete with hearsay was never subject to cross examination and should not be relied upon by the Trial Chamber. Further, regardless of whether any incidents it describes were of sufficient gravity, the alleged perpetrators were MPs and thus not subordinates of GOTOVINA.¹⁷¹⁵
1087. The Prosecution relies solely on untested, uncorroborated evidence for several other specified instances of inhumane acts and cruel treatment. For example, the Prosecution tendered the Rule 92 *bis* testimony of Dragutin JUNJGA, who stated that, on some unspecified date after Operation Storm, “soldiers” came into his home to steal.¹⁷¹⁶ They allegedly put JUNJGA against the wall in front of the house and shot around him, leaving him frightened, but unharmed.¹⁷¹⁷ Putting aside whether the matter is sufficiently grave or the story is accurate, it fails to provide adequate evidence to determine whether the “soldiers” had a subordinate relationship to GOTOVINA. A generic reference to “soldiers” or “Croatian Army” could refer to units subordinated to another command, MPs, AWOL soldiers out of the effective control of their command, MUP special police, civilian police or even civilian criminals dressed in uniform.
1088. A similar evidentiary weakness afflicts the Rule 92 *quater* testimony of Vesela DAMJANIC, who alleged two instances of mistreatment by unidentified criminals referred to as “soldiers.”¹⁷¹⁸ First, she alleged that she was told by a “soldier” to come with him to look for something. The soldier then told her to enter a house to make sure there were no booby traps. There were none. The

¹⁷¹⁴ *Popovic*, T.J., para.901, fns.3093,3094; Art.49, Geneva Convention III; Art.17(1), Additional Protocol II.

¹⁷¹⁵ [REDACTED] P-2690(Drca), pg.4.

¹⁷¹⁶ PTB, para.125; P-2685(Junjga), pg.10.

¹⁷¹⁷ P-2685(Junjga), pg.10.

¹⁷¹⁸ PTB, para.125.

second allegation in her Rule 92 *quater* statement is that, on 16 August, 3 “soldiers” burned the dress of her invalid neighbor.¹⁷¹⁹

1089. Because this Rule 92 *quater* statement is uncorroborated and its credibility untested by cross-examination, it cannot satisfy the Prosecution’s burden of proof that the incidents actually occurred or that the perpetrators were in the command and effective control of GOTOVINA at the time of the incidents.
1090. The Prosecution also contends that Draginja URUKALO suffered inhumane acts and cruel treatment by “being forced to strip to her underwear and ordered to play basketball behind her house by Croatian soldiers, even if she was in her 70s at the time.”¹⁷²⁰ The only evidence of this event comes from URUKALO herself, whose credibility is questionable.
1091. Specifically, URUKALO testified that her house was looted of a “plough and a cement mixer...27 sheep, 20 lambs, 2 cows, 2 calves, and 2 pigs.”¹⁷²¹ The truth is that URUKALO never had these items looted. Rather, in November 1995, she signed an authorization to allow her daughter and son-in-law to manage and dispose of this same property.¹⁷²² In light of this credibility problem, and the fact that her story about being forced to strip was contradicted by her grandson,¹⁷²³ this incident has not been proven.
1092. Further, even had this occurred, it is significant that URUKALO was physically unharmed by a one-time event of limited duration. Although it is unacceptable behavior that GOTOVINA would never have tolerated had he known about it,¹⁷²⁴ it is not of sufficient gravity to qualify as a violation under Counts 8 and 9.
1093. Finally, at the Rule 98 *bis* argument, the Prosecution asserted that reports of unkind words from men who were “armed and in uniform,” such as “Chetnik, go away, this is not your country,” satisfy its burden of proof for Counts 8 and 9. The Defence disputes that the low quality of this evidence could meet the

¹⁷¹⁹ P-632(Damjanic),pg.4-5.

¹⁷²⁰ 98*bis*,T:17423:17-19.

¹⁷²¹ P-964(Urukalo),para.7.

¹⁷²² D-838(Urukalo); Urukalo,T:10098:2-10100:4.

¹⁷²³ Urukalo,T:10100:23-10103:13.

¹⁷²⁴ D-1425(Rajcic),para.17.

Prosecutions burden of proof. Further, insults and epithets, while distasteful, are not sufficiently grave to trigger the protection of Articles 3 and 5.

IX. Concluding submissions


1094. Because there is no basis upon which a conviction on any count could be entered against General Ante GOTOVINA, the Defence need not address the issue of sentencing.

1095. For all the reasons set forth in this Final Trial Brief, the Trial Chamber must enter a finding of not guilty on each count of the Joinder Indictment.

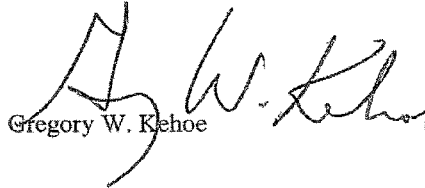
Dated this 16th day of July 2010

Word Count including Appendices: 86,164


Respectfully submitted,



Luka S. Misetić, Esq.



Gregory W. Kehoe



Payam Akhavan

Defence Counsel for General Ante Gotovina

APPENDIX

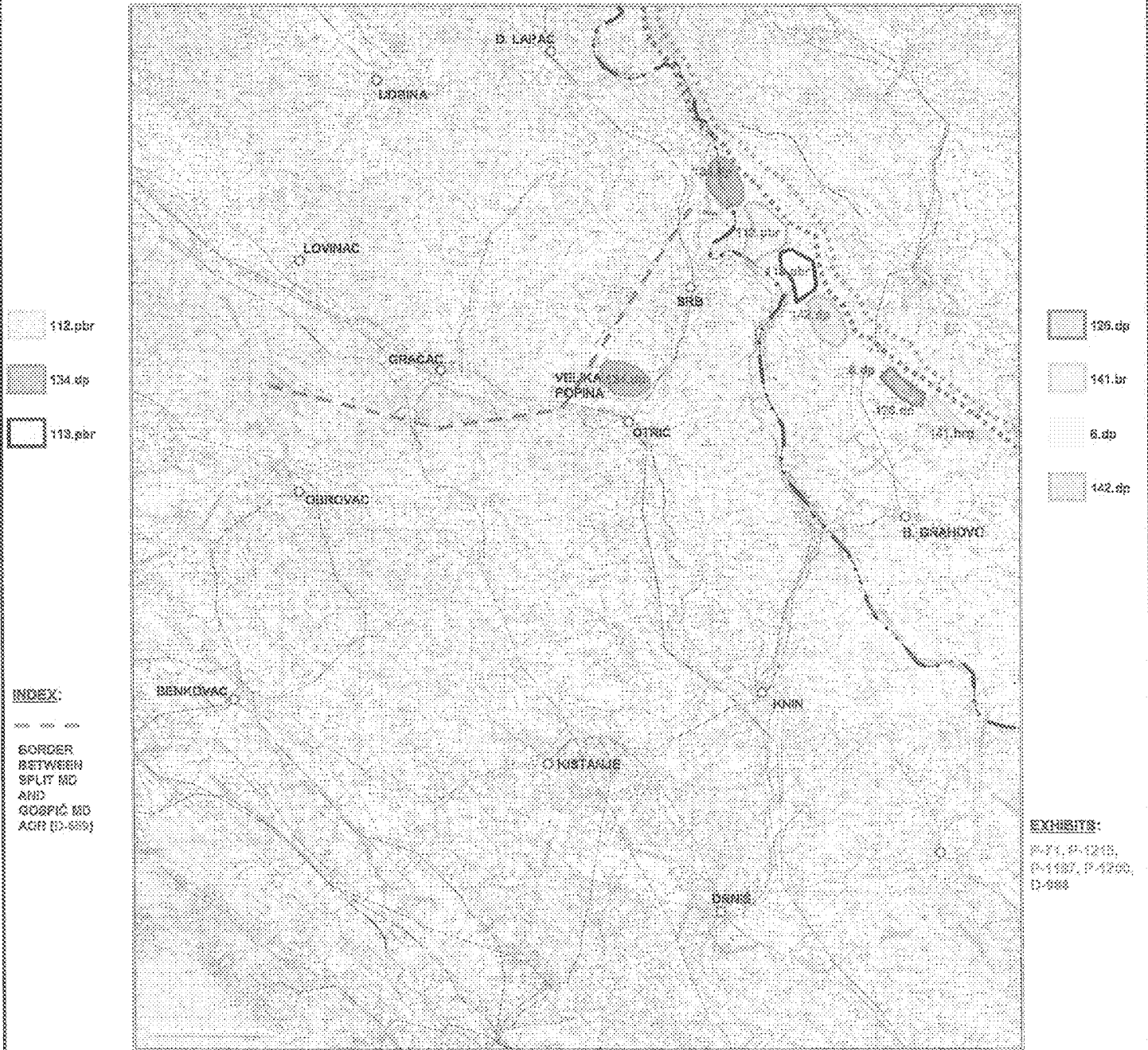
A



APPENDIX

B

POSITION OF 134 HOMEGUARD REGIMENT AND OTHER SPLIT MD UNITS ON 18 AUGUST



APPENDIX

C

FC INCIDENTS OUTSIDE THE SPLIT MD AOR

INDEX:

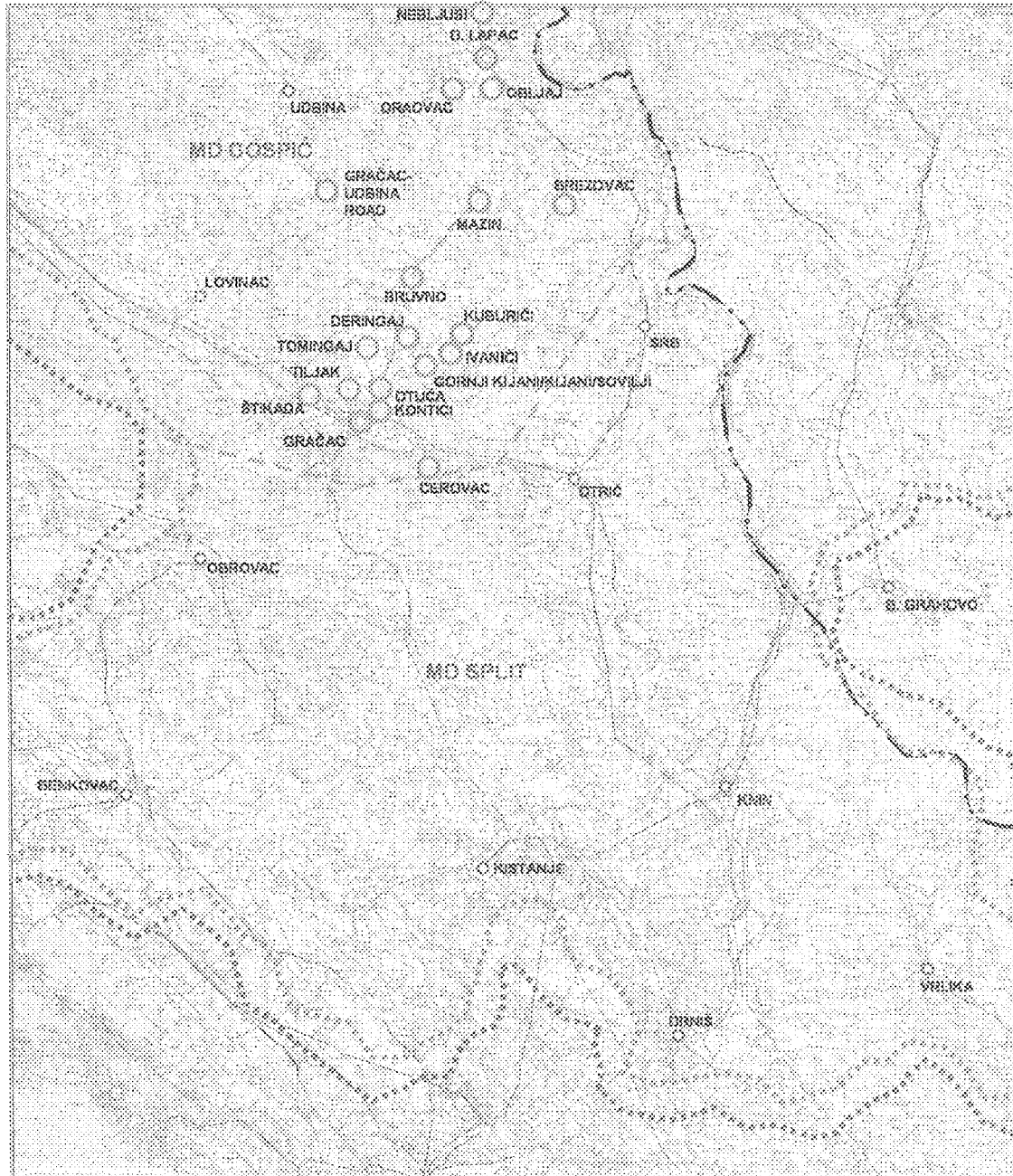
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BATTLE
POSITION
OF HV &
HVZ (30
AUG 95)

APPROX.
BATTLE
POSITION
OF ANSK &
AVZ (30
AUG 95)

INTERNATIONAL
BORDER

BORDER
BETWEEN
SPLIT MD
AND
GOSPIĆ MD
AOR (D-279,
D-280)
(08 AUG 95)

BORDER
BETWEEN
SPLIT MD
AND
GOSPIĆ MD
AOR (D-289)
(14 AUG 95)



○
LOCATIONS OF
FC INCIDENTS

FC INCIDENTS IN MUNICIPALITIES MAPPED ABOVE:

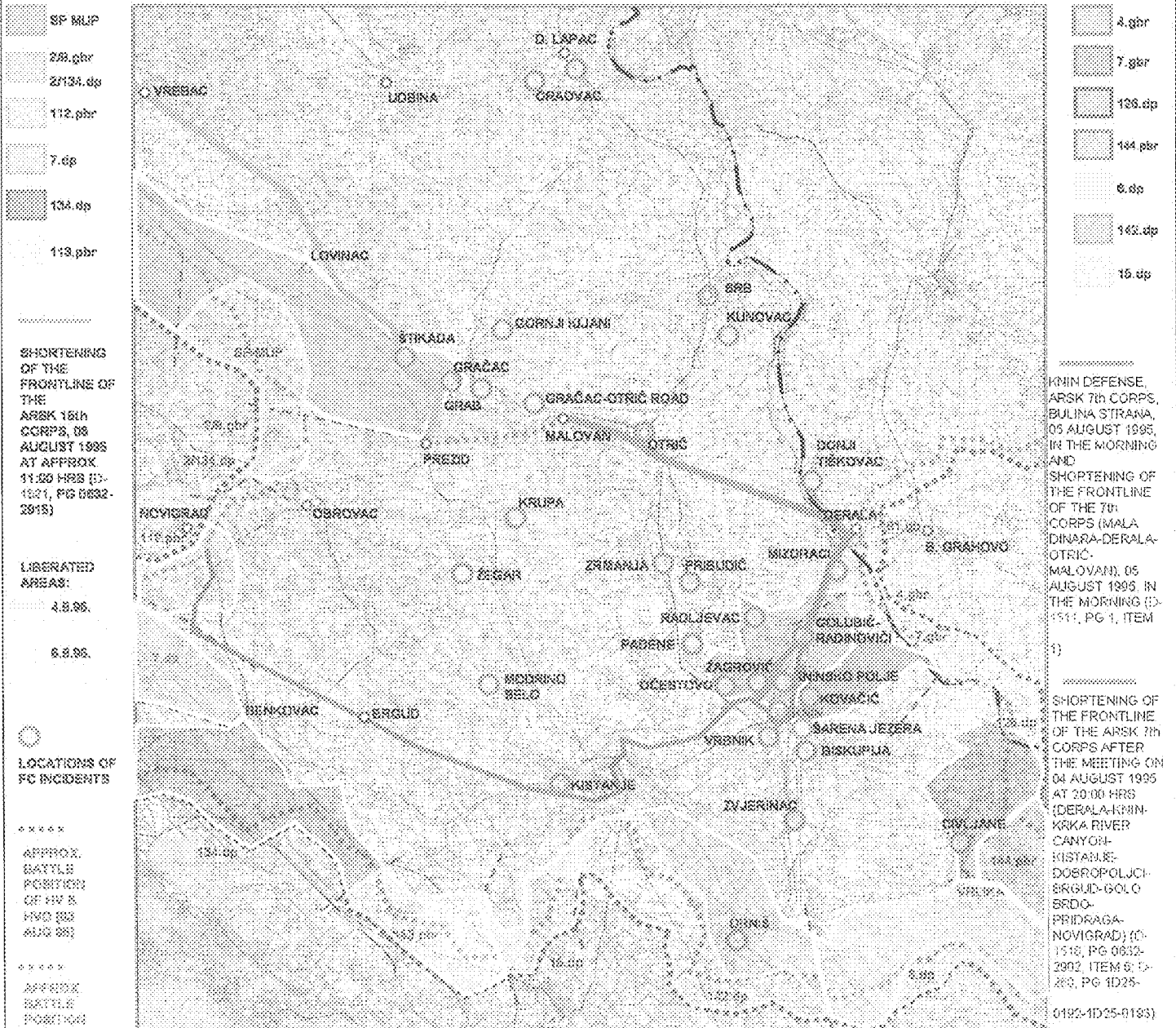
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CEROVAC: FC97, FC99; GRAČAC: FC58; KONTIĆ: FC59;

APPENDIX

D

LOCATION OF SELECT INCIDENTS RELATIVE TO COMBAT



FC INCIDENTS IN MUNICIPALITIES MAPPED ABOVE (8 AUGUST 1995)

BISKUPIJA: FC283, FC284; CIVLIJANI: FC390, FC391; GRAČAC-OTRIĆ ROAD: FC53; DOLJI LAPAC: FC286; DOLJI TRNKOVAC: FC291; DRNIŠ: FC272, FC273, FC275; GOLUBICE: FC187, FC188; GOLUBICE RADNOVIČI: FC121, FC122, FC123, FC124, FC125; GRAB: FC74, FC75; GRAB: FC69; GRAČAC: FC68; KRISTALJE: FC111; KNIN: FC157, FC158, FC160, FC162, FC163, FC164, FC181; KNIN HOSPITAL: FC388, FC231; KNIN TOWN: FC171, FC178; KNIN CEMETERY: FC159, FC161, FC263, FC284; KNIN NEAR MILITARY BARRACKS: FC185, FC186, FC187, FC188, FC189, FC190; KRNINSKO POLJE: FC227; KOVAČIĆ: FC236, FC231, SK 1.3, SK 1.1, SK 1.3; KRUPA: FC323; KUNOVAC: FC292; MIZDRAKOVAC: FC181; MODRINI BELD: FC113; OČENIČKO: FC158, FC161, FC232; OČENIČKO: SK 10.1; OTRIĆ: FC24; PADENE: FC234; PRIBUDIĆ: FC78; RADLJEVAC: FC144, FC145, FC148; SBB: FC288; SARANA JEZERA: SK 6.1, SK 6.2, SK 6.3, SK 6.4, SK 6.5, SK 6.6, SK 6.7; STIKADA: FC52; TRNKOVAC: FC257, FC287; VZERINAC: FC368, FC268, FC276; ZAGROVČI: FC138, FC137, FC244, SK 3.3, SK 3.4, SK 3.2, SK 3.1; ŽEGAR: FC316, FC318;

APPENDIX E

**APPENDIX E
DEATHS FROM NATURAL CAUSES**

FC Number	Alleged Date of Death	Pertinent Record Evidence	Body Recovered From Hospital
127	Around 6-Aug	D-57,pg.70;D-69;D-366;D-1222; [REDACTED] P-1398;P-2072.	
200	5-Aug	P-1251,pg.19;P-1628.	Yes
207	23-Aug	P-1251,pg.19;P-1635;P-2105.	Yes
214	7-Aug	D-348; [REDACTED] P-659;P-1640;P-1440;P-2108.	Yes
215	7-Aug	P-1215,pg.19.	Yes
223	18-Aug	P-1448.	Yes
225	18-Aug	D-1237; [REDACTED] P-1450.	Yes
228	24-Aug	P-1251,pg.19;P-1647;P-2115.	Yes
314	14-Aug	D-57,pg.74;D-1393;P-1500.	

APPENDIX F

APPENDIX F
UNASCERTAINED CAUSES OF DEATH WITH AUTOPSY REPORTS AND NO
EVIDENCE SUPPORTING UNLAWFUL CAUSE OF DEATH

FC Number	Alleged Date of Death	Pertinent Record Evidence
15	20-Sept	P-1540;P-2031.
16	15-Sept	D-371;P-1251;P-1324;P-1541;P-2402.
51	2-Sept	P-1345;P-1551;P-2314,pg.91.
58	17-Aug	P-1352;P-1556;P-2314,pg.66.
59	17-Aug	P-1353;P-1557;P-2314,pg.66.
64	10-Aug	P-1358;P-1560;P-1810;P-1811;P-2043;P-2314,pg.99.
65	12-Sept	P-1359;P-1561;P-2314,pg.104.
68	8-Sept	P-1362;P-1564;P-2005;P-2045;P-2314,pg.98.
105	22-Sept	D-375;P-659;P-1380;P-1586;P-1859;P-2062.
113	4-Sept	P-1385;P-1589;P-2003;P-2065;P-2402,pg.45.
191	5-Aug	█ P-1622;P-1907;P-2004;P-2096.
193	11-Aug	P-1423;P-1623;P-2007;P-2097.
197	5-Aug	P-1427;P-1626;P-2099.
202	4-Aug	D-348;█ P-1630;P-1999;P-2101;P-2402.
205	4-Aug	P-1251,pg.13;P-1433;P-1633;P-1918;P-2006;P-2104.
206	18-Aug	P-1434;P-1634.
226	23-Aug	P-1451;P-1645.
229	5-Aug	P-1251,pg.19;P-1648;P-2116.
230	13-Aug	P-1649.
238	12-Sept	D-69;P-1459;P-1657;P-2402.
240	14-Aug	D-69;P-1460;P-1659;P-2402.
241	14-Aug	D-69;P-1461;P-1660;P-2402.
264	5-Aug	P-1471;P-1670;P-2125.
268	5 Aug	P-1475;P-1674;P-2128.
289	11-Sept	D-368;P-1485;P-1684;P-1973;P-2008;P-2137;P-2314,pg.99.
294	16-Aug	D-354;P-1489;P-1688;P-1982;P-2141.
297	29-Aug	P-1492;P-1691;P-1987;P-1988;P-2005;P-2144; P-2314,pg.82.

APPENDIX G

**APPENDIX G
UNASCERTAINED CAUSES OF DEATH WITH NO AUTOPSY REPORTS AND NO
EVIDENCE SUPPORTING UNLAWFUL CAUSE OF DEATH**

FC Number	Alleged Date of Death	Pertinent Record Evidence
8	6-Aug (approx)	P-177; [REDACTED] P-2402.
35	7-Aug	D-348;D-351;D-354;P-1330.
36	7-Aug	P-1331.
37	7-Aug	P-1332.
38	7-Aug	P-1333.
40	7-Aug	D-348;P-1335.
41	7-Aug	P-1336.
43	10-Aug	P-1338.
45	12-Aug	D-354;P-1340.
56	10-Aug	D-69;D-352;P-1350.
61	9-Sept	D-366;P-1335.
63	10-Sept	D-366;P-1357.
77	8-Aug	P-1517,pg.2.
104	12-Aug	D-354; [REDACTED] P-1379.
108	8-Aug	D-353;P-1518.
109	8-Aug	D-353;P-1518.
115	2-Sept	P-1387.
116	2-Sept	P-1388.
120	September	[REDACTED] P-2402.
139	22-Aug (approx)	D-179;D-360;D-382; [REDACTED] P-27;P-177;P-236; [REDACTED] P-2681; [REDACTED] P-2402.
192	20-Sept	P-1422.
194	16-Aug	[REDACTED] P-1424;P-2700.
272	5-Aug	D-353; [REDACTED] P-1518.
273	5-Aug	D-353; [REDACTED] P-1518.
275	5-Aug	D-353;P-1518.
276	28-Sept	P-1477.
277	6-Aug	D-353; [REDACTED] P-1518.
301	5-Aug	P-1519.

**APPENDIX G
UNASCERTAINED CAUSES OF DEATH WITH NO AUTOPSY REPORTS AND NO
EVIDENCE SUPPORTING UNLAWFUL CAUSE OF DEATH**

FC Number	Alleged Date of Death	Pertinent Record Evidence
302	17-Aug	P-1519;P-2402.
303	17-Aug	P-1519.
304	17-Aug	P-1519.
307	17-Aug (approx)	D-69;D-354;P-1495.
308	17-Aug	D-69;P-1496.
309	25-Sept	D-69;P-1497.
310	25-Sept	D-69;P-1498.
313	8-Aug	P-1499.
315	9-Sept	D-69;P-1501.
320	4-Aug	D-1314,pg.11.
321	4-Aug	P-1502.
322	24-Aug	P-1503.
324	22-Aug	P-233;P-1505.
325	21-Aug	D-69;P-1506.
326	13-Aug	D-69;P-1507.
327	13-Aug	P-1508.
328	29-Aug	P-1509.
329	29-Aug	P-1510.
330	7-Aug	P-1511.
331	7-Aug	P-1512.
332	12-Aug	D-69;P-1513.
333	22-Aug	P-1514.
336	6-Aug	D-347;P-1515.
337	6-Aug	D-347;P-1516.

APPENDIX H

**APPENDIX H
DEATHS OF ARSK SOLDIERS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
1	6-Aug	D-69;D-1239;D-1242;P-1251;P-2025.
34	7-Aug	P-1329.
39	7-Aug	D-348;P-1334.
53	5-Aug	P-1347;P-1553;P-1795;P-2007.
54	10-Aug	P-1348;P-1554.
129	16-Aug(approx)	D-69;D-359; [REDACTED] P-9;P-226; [REDACTED] P-700;P-1400;P-1600;P-1869;P-1870;P-2074;P-2402;P-2682.
130	16-Aug(approx)	D-3;D-69;D-359; [REDACTED] P-9;P-226; [REDACTED] P-700;P-1401;P-1601;P-1871;P-1872;P-2075;P-2402;P-2682.
160	5-Aug	P-1417;P-1615;P-2089.
161	5-Aug	P-1418;P-1616;P-1896;P-1897;P-2007;P-2090.
198	29-Aug	P-1428
210	11-Aug	D-69; [REDACTED] P-1436.
212	7-Aug	P-1438;P-1639;P-2006.
213	7-Aug	P-1251;P-1439.
218	7-Aug	P-1443;P-1641;P-2109.
219	7-Aug	D-348;D-367; [REDACTED] P-659;P-1444;P-1642;P-1922;P-2110.
221	5-Aug	P-1446;P-1643;P-2111.
244	5-Aug	P-1253;P-1254;P-1463;P-1942;P-1943.
284	18-Aug(approx)	D-92;D-391;P-68;P-177;P-516,para.56; [REDACTED] P-824;P-2569.
290	5-Aug	D-368;P-90;P-1486;P-1685;P-1974;P-1975;P-2138.
323	5-Aug	D-379;D-1311,pg.4;P-1504;P-1694;P-1996;P-1997;P-1998.

APPENDIX I

**APPENDIX I
COMBAT RELATED DEATHS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
2	6-Aug	D-363;P-1317;P-1535;P-1774;P-2000;P-2026.
3	6-Aug	D-69;D-363;D-382;P-247 [REDACTED] P-1318;P-1536;P-1775;P-2027.
4	8-Aug	D-69;D-363;D-382;P-247; [REDACTED] P-1098;P-1319;P-1537;P-1776;P-2028.
22	8-Aug	D-179;D-371;D-382;D-1410; [REDACTED] P-789;P-1327;P-1544;P-1778;P-1779;P-1780;P-2034;P-2506.
44	8-Aug	[REDACTED] D-354;P-89;P-90;P-91;P-1339;P-1783;P-1784;P-2035.
46	7-Aug	P-1546;P-2036.
49	24-Aug	P-1345;P-1549.
52	9-Aug	P-1346;P-1552;P-1794;P-2006;P-2040.
55	10-Aug	P-1349;P-1555;P-1797;P-1798;P-1799;P-2007;P-2041;P-2314.
60	5-Aug	P-1354;P-1558;P-1803;P-1804;P-2042.
62	10-Sept	D-366;P-1356;P-1559;P-1805-P-1809.
66	11-Aug	P-1360;P-1562;P-1814;P-1815;1816.
69	5-Aug	P-1363;P-1565;P-1822;P-2046.
74	5-Aug	P-1368;P-1570;P-1834;P-1835;P-1836;P-2004;P-2047.
75	5-Aug	P-1369;P-1571;P-1837;P-1838;P-2048.
76	5-Aug	P-1370;P-1572;P-2049.
78	8-Aug	D-69;D-382;P-1371;P-1573.
110	8-Aug	D-359;P-2063.
111	5-Aug	P-1383;P-1587;P-1860;P-1861;P-1862.
117	15-Sept	D-371;P-1389;P-1591.
118	6-Sept	P-1390.

**APPENDIX I
COMBAT RELATED DEATHS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
121	5/6-Aug	D-57;D-69;D-364;P-49;P-244; [REDACTED] P-1392;P-1593;P-2067.
122	5/6-Aug	D-57;D-69;D-364;P-49;P-244; [REDACTED] P-1393;P-1594;P-1865;P-2068.
123	5/6-Aug	D-57;D-69;D-364;P-49;P-244; [REDACTED] P-1394;P-1595;P-1866;P-2069.
124	5/6-Aug	D-57;D-69;D-364;P-49;P-244; [REDACTED] P-1395;P-1596;P-1867;P-1868;P-2070.
125	5/6-Aug	D-57;D-69;D-364;P-49;P-244; [REDACTED] P-1396.
128	4-Aug(approx)	D-69;D-354; P-659;P-1399;P-1599;P-2073.
162	7-Aug	D-6;D-57;D-354; [REDACTED] P-52; [REDACTED] P-700;P-1419;P-1617;P-2006;P-2091;P-2402.
163	7-Aug	D-57;D-354; [REDACTED] P-52; [REDACTED] P-700;P-1420;P-1618;P-2006;P-2092;P-2402.
222	4-Aug	P-90;P-1251;P-1447;P-1644;P-1923;P-1924;P-2112.
227	5-Aug	P-1452;P-1646;P-1926;P-1927;P-2114.
262	6-Aug	P-1469;P-2123.
263	6-Aug	P-1470;P-1669;P-1950;P-2124.
265	10-Aug	P-1472;P-1951;P-1671.
267	4-Sept	P-1474;P-1673;P-2006;P-2127.
269	5-Aug	P-1476;P-1675;P-1953;P-2129.
280	11-Aug (approx)	P-1480;P-1959;P-1960;P-1961;P-1678;P-2133;P-2314.
287	10-Aug	P-1483;P-1682.
288	20-Aug	P-1484;P-1683;P-1971;P-1972.
292	5-Aug	D-69;P-1487;P-1686;P-1977;P-1978;P-1979.
298	7-Aug	P-1493;P-1692;P-1989-P-1992;P-2145;P-2314.
299	6-Aug	P-1494;P-1693;P-1993;P-1994;P-1995;P-2314.

APPENDIX J

**APPENDIX J
NO RECORD EVIDENCE OF ALLEGED PERPETRATORS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
9	Mid-Sept	D-820;P-154;P-276; [REDACTED]
14	26-Sept	D-820;P-276; [REDACTED] P-1322.
17	15-Sept	D-69;D-383;P-234;P-276;P-413; [REDACTED] P-1325;P-1542;P-2004;P-2032.
19	August	Vujnovic,T:4562:1-8;D-386;P-234 [REDACTED] P-2402;P-2569
20	10-Aug (approx.)	Vujnovic,T:4562:1-8;D-179;D-386;P-234; [REDACTED] P-2402;P-2569.
42	8-Aug	D-354;P-1337;P-1545;P-1781;P-1782;P-2314(pgs.42-43).
47	12-Aug	P-1341;P-1547;P-1785;P-1786;P-2037.
48	24-Aug	D-358;P-10;P-90;P-700;P-1342;P-1548;P-1787;P-1788;P-2038;P-2314(pg.80).
50	1-Sept	P-1344;P-1550;P-1791;P-1792;P-2005;P-2039.
71	25-Sept	P-795;P-1365;P-1567.
72	25-Sept	P-795;P-1366;P-1568.
81	27-Aug	D-69;P-1372;P-1574;P-1839;P-2050.
84	September	D-740(pg.19);P-273;P-276; [REDACTED] P-989.
106	26-Aug	D-69;D-359; [REDACTED] P-1381;P-2402.
114	4-Sept	P-1386;P-1590.
119	10-Aug	D-362;P-238;P-1391;P-1592;P-1863;1864;P-2066.
138	19-Aug	D-360;D-382;P-27;P-236; [REDACTED] P-2681; [REDACTED] P-1404;P-1603;P-1873;P-2077.
157	5-Aug	D-354;P-36 [REDACTED] P-1414;P-1612;P-1893;P-1894;P-1895;P-2086.
158	5-Aug	D-354; [REDACTED] P-36;P-659; [REDACTED] P-1415;P-1613;P-2007;P-2087.
182	6-Aug (approx)	D-57;P-274; [REDACTED] P-2402.
183	6-Aug (approx)	D-57;P-274; [REDACTED] P-2402.
195	6-Aug	P-1251;P-1425;P-1624;P-1908;P-1909;P-2006;P-2098.
196	16-Aug	D-69;P-1426;P-1625;P-1910;P-1911.
199	4-Sept	D-364;P-1251;P-1429;P-1627;P-1912;P-1913;P-2100;P-2402.
201	18-Sept	D-69;P-729;P-1251;P-1430;P-1629;P-1914.
203	5-Aug	P-659;P-1251;P-1431;P-1631;P-1915;P-2102.
204	9-Aug	P-90;P-1432;P-1632;P-1916;P-1917;P-2103.
208	22-Aug	P-1636;P-2106.

**APPENDIX J
NO RECORD EVIDENCE OF ALLEGED PERPETRATORS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
209	9-Aug	P-1435;P-1637;P-2107.
211	10-Aug	P-1437;P-1638.
231	5-Aug	P-1650;P-1928;P-1929;P-2007;P-2702.
232	5-Aug	P-1454; P-1651;P-1930;P-1931;P-2007;P-2117.
233	22-Sept	P-1455;P-1652;P-1932;P-1933;P-1934.
235	20-Aug	P-659;P-1456;P-1654;P-2119.
236	27-Aug	D-69;P-1457;P-1655;P-1936;P-1937.
237	25-Aug	P-1458;P-1656;P-1938;P-1939;P-2007.
242	12-Sept	D-69;P-1462;P-1661;P-1940;P-1941.
245	25-Aug	D-69;P-1464;P-1663;P-1944.
246	14-Aug	P-1465;P-1664;P-1945.
247	9-Aug (approx)	██████████ P-2402.
250	9-Aug (approx)	P-429; ██████████ P-2681; ██████████ P-2402.
251	9-Aug (approx)	██████████ P-2402.
252	9-Aug (approx)	██████████
253	9-Aug (approx)	██████████ P-689;P-2402.
254	9-Aug (approx)	██████████ P-689;P-2402.
255	9-Aug (approx)	██████████ P-2681; ██████████ P-2402.
260	6-Aug	██████████
266	18-Aug	D-375;P-154; ██████████ P-1473;P-1672;P-1952;P-2006;P-2126.
278	20-Aug	P-1478;P-1676;P-1954;P-2005;P-2131.
279	20-Aug	P-1479;P-1677;P-1955;P-1956;P-1957;P-1958;P-2007;P-2132.
281	Around 11- Aug	D-367;P-1481;P-1668;P-1963;P-2134;P-2314;P-2402.
282	8-Aug	D-367;P-1482;P-1964;P-1965;P-1966;P-1967;P-1680;P-2135; P-2314;P-2402.
286	11-Sept	D-69;D-179;D-368;D-511;P-142;P-248;P-669; ██████████ P-700;P-710;P-1164;P-1681;P-1968;P-1969;P-1970;P-2136;P-2402.

**APPENDIX J
NO RECORD EVIDENCE OF ALLEGED PERPETRATORS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
293	21-Aug	P-1488;P-1687;P-1980;P-1981;P-2005;P-2140.
295	16-Aug	D-354;P-1490;P-1689;P-1983;P-1984;P-2142;P-2402.
296	16-Aug	D-354;P-1491;P-1690;P-1985;P-1986;P-2143;P-2402.
305	12-Sept	D-179;P-39;P-258;P-260;P-261;P-276 [REDACTED] P-700;P-923;P-1290;P-2402.
306	12-Sept	D-179;P-258;P-260;P-261;P-276; [REDACTED] P-700;P-923;P-1290;P-2402.
311	8-Aug	Kardum,T.9329:8-23;P-896;P-2397.
316	September	P-276; [REDACTED] P-2402.

APPENDIX K

**APPENDIX K
SELECT EXAMPLES OF CROATIAN INVESTIGATIONS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
7	4-Sept	D-9;D-57;D-179;P-36;P-250; [REDACTED] P-1286.
26	5-Aug(approx)	D-69;D-366;D-1567;P-252; [REDACTED] P-2582.
27	29-Sept	D-390;P-264;P-328;P-417;P-425; [REDACTED] P-774;P-1098;P-1106.
28	29-Sept	D-390;D-1315;P-240;P-328;P-425; [REDACTED] P-774;P-1098;P-1106;P-2402.
87	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688; P-1373;P-2582;P-2689.
88	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688;P-1375;P-2582;P-2689.
89	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688;P-2582;P-2689.
90	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688;P-1374;P-1575;P-1840;P-2000;P-2051;P-2582;P-2689.
91	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688;P-1376;P-1576;P-1841;P-2000;P-2052;P-2582;P-2689.
92	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688;P-1377;P-2582;P-2689.
93	26-Aug	D-69;D-361;D-807;D-1539-D-1553;P-27;P-34;P-48;P-635;P-688;P-1378;P-2582;P-2689.
95	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169; P-1577;P-1842;P-1843; P-2000;P-2053;P-2191;P-2513;P-2514.
96	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1578;P-1844;P-1845;P-2000;P-2054;P-2191;P-2513;P-2514.
97	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1579;P-1846;P-1847;P-2055;P-2191;P-2513;P-2514.

**APPENDIX K
SELECT EXAMPLES OF CROATIAN INVESTIGATIONS**

FC Number	Alleged Date of Death	Pertinent Record Evidence
98	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1580;P-1848;P-2056;P-2191;P-2513;P-2514.
99	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1581;P-1849-P-1853;P-2057;P-2191;P-2513;P-2514.
100	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1582;P-1854;P-2058;P-2191;P-2513;P-2514.
101	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1583;P-1855;P-2059;P-2191;P-2513;P-2514.
102	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169;P-1584;P-1856;P-2060;P-2191;P-2513;P-2514.
103	28-Sept	D-376;D-802;D-808;D-913-D-919;D-1539-D-1553; [REDACTED] P-1169; P-1585;P-1857;P-1858;P-2061;P-2191;P-2513;P-2514.
107	18-Aug	D-69;D-355;P-2402.
155	15-Aug(approx)	D-57;D-364;D-1393; [REDACTED] P-1076;P-1105;P-1412.
305	12-Sept	D-1356.
306	12-Sept	D-1356.
311	8-Aug	Kardum,T:9329:8-23;P-896;P-2397.

APPENDIX L

**APPENDIX L
INSUFFICIENT EVIDENCE AS TO PERPETRATORS**

FC Number	Alleged Date of Death	Analysis of Record Evidence
25	5-Aug (approx)	D-366;D-1314;D-1315;P-252; [REDACTED] P-774;P-931. There was no <i>viva voce</i> testimony relating to this incident. Hearsay evidence is provided through [REDACTED] wherein it notes this individual was "shot by HV soldiers during 1 st days of attack." The underlying support cited is UNCIVPOL report dated 6-Sept which states that Dusan SUICA told them that two men were shot by Croatian soldiers during some of the first days of the attack and they were buried by inhabitants. The witness called to testify about this UNCIVPOL report, MALM, did not recall being told this story by the alleged witness. P-774,pg. 12.
27	29-Sept	D-390;P-264;P-328;P-417;P-425; [REDACTED] P-774;P-1098;P-1106. There was no <i>viva voce</i> testimony relating to this incident. The hearsay evidence provided claims that on 29-Sept this individual was shot by uniformed men. Croatian officials investigated this incident, even taking two witnesses to Zadar to identify the men they had in custody. The villagers did not identify these men. No unit was ever identified for this group.
28	29-Sept	D-390;D-1315;P-240;P-328;P-425; [REDACTED] P-774;P-1098;P-1106;P-2402. Same as FC27.
112	11-Sept	D-179;D-370;P-276; [REDACTED] P-1384;P-1588;P-2064;P-2402. There was no <i>viva voce</i> testimony relating to this incident. Hearsay evidence is provided through [REDACTED] claiming that this person was killed by the HV; however there is no source evidence in the record underlying this allegation. Further, no unit was ever identified as being related to this incident.
142	5/6-Aug	D-57;D-69;D-161;D-357;P-27;P-1405;P-1604;P-1874;P-1875;P-2078;P-2402. This incident allegedly occurred in the Golubic area, which had a major ARSK military installation. There is no witness testimony as to this death. The only evidence of alleged perpetrators is an HRAT report and the Croatian Helsinki Report ("CHR"), which both only provide un-sourced speculation as to the